

MONTANA LEGISLATIVE HISTORY

Chapter 573 19 85

Bill H 680 S _____ Original bill & history ☒ c

H. Committee on Natural Resources

Hearing Date(s) 2-18 _____ c

2-20 _____ c

_____ c

_____ c

Date Out _____ c

S. Committee on Natural Resources

Hearing Date(s) 3-13 _____ c

3-15 _____ c

3-18 _____ c

3-19 _____ c

Did this bill originate in an interim committee? _____ Yes _____ No

Committee _____

Report _____

HOUSE FINAL STATUS

2/06	FISCAL NOTE REQUESTED	
2/11	HEARING	
2/13	FISCAL NOTE RECEIVED	
2/25	COMMITTEE REPORT-BILL PASS AS AMENDED	
2/25	STATEMENT OF INTENT ATTACHED	
2/27	2ND READING PASS	78 21
2/27	ON MOTION RULES SUSPENDED	
	PLACED ON 3RD READING THIS DAY	
2/27	3RD READING PASS	79 20
	TRANSMITTED TO SENATE	
3/05	REFERRED TO PUBLIC HEALTH, WELFARE & SAFETY	
3/22	HEARING	
3/25	COMM REPORT-BILL CONCURRED AS AMENDED	
3/28	2ND READING CONCURRED	23 22
3/30	ON MOTION TAKEN FROM 3RD READING	
3/30	REFERRED TO FINANCE & CLAIMS	
4/04	HEARING	
4/05	COMMITTEE REPORT-BILL CONCURRED	
4/09	2ND READING CONCURRED	32 16
4/11	3RD READING CONCURRED	35 15
	RETURNED TO HOUSE WITH AMENDMENTS	
4/15	2ND READING AMENDMENTS CONCURRED	92 3
4/16	3RD READING AMENDMENTS CONCURRED	86 6
4/18	SIGNED BY SPEAKER	
4/18	SIGNED BY PRESIDENT	
4/22	TRANSMITTED TO GOVERNOR	
4/25	SIGNED BY GOVERNOR	
	CHAPTER NUMBER 633 EFFECTIVE DATE: 4/25/85	
HB 677	INTRODUCED BY WINSLOW, SCHULTZ, ET AL. EXTENDS 50 CENTS PER GALLON INCENTIVE FOR DISTILLED ALCOHOL USED FOR GASOHOL	
2/05	INTRODUCED	
2/05	REFERRED TO TAXATION	
2/11	HEARING	
	DIED IN COMMITTEE	
HB 678	INTRODUCED BY NISBET, MCCORMICK ADOPTING MOUNTAIN STANDARD TIME ON YEAR-ROUND BASIS	
2/05	INTRODUCED	
2/05	REFERRED TO STATE ADMINISTRATION	
2/15	HEARING	
	DIED IN COMMITTEE	
HB 679	INTRODUCED BY D. BROWN, IVERSON LOCAL APPROVAL TAX INCENTIVE FOR NEW OIL PRODUCTION	
2/05	INTRODUCED	
2/05	REFERRED TO TAXATION	
2/06	FISCAL NOTE REQUESTED	
2/11	FISCAL NOTE RECEIVED	
2/12	HEARING	
	DIED IN COMMITTEE	
HB 680	INTRODUCED BY IVERSON, BLAYLOCK, HARP, ET AL.	

HOUSE FINAL STATUS

WATER POLICY REVISIONS BY REQUEST OF SELECT COMMITTEE ON WATER MARKETING

2/05	INTRODUCED		
2/05	REFERRED TO NATURAL RESOURCES		
2/18	HEARING		
2/21	COMMITTEE REPORT-BILL PASS AS AMENDED		
2/23	2ND READING PASS	87	8
2/26	3RD READING PASS	83	15
	TRANSMITTED TO SENATE		
3/04	REFERRED TO NATURAL RESOURCES		
3/13	HEARING		
3/16	FISCAL NOTE REQUESTED		
3/20	FISCAL NOTE RECEIVED		
3/21	COMM REPORT-BILL CONCURRED AS AMENDED		
3/21	STATEMENT OF INTENT ATTACHED		
3/26	2ND READING CONCURRED AS AMENDED	44	6
3/28	3RD READING CONCURRED	45	5
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS CONCURRED	77	19
4/09	ON MOTION RULES SUSPENDED		
	PLACED ON 3RD READING THIS DAY		
4/09	3RD READING AMENDMENTS CONCURRED	79	18
4/15	SIGNED BY SPEAKER		
4/15	SIGNED BY PRESIDENT		
4/15	TRANSMITTED TO GOVERNOR		
4/19	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 573 EFFECTIVE DATE: 7/01/85		

HB 681 INTRODUCED BY J. BROWN, BRADLEY ALLOW RELEASE OF CONFIDENTIAL HEALTH INFORMATION TO MEDIA & LAW ENFORCEMENT

2/05	INTRODUCED		
2/05	REFERRED TO JUDICIARY		
2/07	HEARING		
2/08	COMMITTEE REPORT-BILL PASS AS AMENDED		
2/12	2ND READING PASS AS AMENDED	65	34
2/14	3RD READING PASS	67	29
	TRANSMITTED TO SENATE		
2/15	REFERRED TO JUDICIARY		
3/15	HEARING		
3/19	COMM REPORT-BILL CONCURRED AS AMENDED		
3/22	2ND READING CONCURRED	48	0
3/25	3RD READING CONCURRED	42	6
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS NOT CONCURRED	96	0
4/12	CONFERENCE COMMITTEE APPOINTED		
4/20	CONFERENCE COMMITTEE DISSOLVED		
4/20	FREE CONFERENCE COMMITTEE APPOINTED		
4/22	FREE CONFERENCE COMMITTEE REPORT		
	HOUSE		
4/23	2ND READING FREE CONFERENCE COMMITTEE REPORT ADOPTED	85	13

1 HOUSE BILL NO. 680
 2 INTRODUCED BY Jason Blaylock Hart Shaw any
 3 BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING Body
 4 De Villingburg Kodas Vincent James Don Brown
 5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER
 6 POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE,
 7 ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER Smith
 8 APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A
 9 LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS
 10 FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER
 11 THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER
 12 RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A
 13 WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT
 14 WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF
 15 WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104,
 16 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202,
 17 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112,
 18 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316,
 19 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983;
 20 REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE
 21 DATE AND AN APPLICABILITY DATE."

22
 23 WHEREAS, the Select Committee on Water Marketing was
 24 commissioned by the 1983 Legislature to undertake a study of
 25 the advantages and disadvantages of water marketing; and

1 WHEREAS, the Select Committee in completing its study
 2 determined that Montana needs to address broader questions
 3 of water policy in order to secure Montana's interests in
 4 allocation and management of state waters; and

5 WHEREAS, the Select Committee has presented a
 6 comprehensive package of recommendations that must be
 7 considered as a whole; and

8 WHEREAS, these recommendations serve to revise
 9 Montana's water policy in order to maximize Montana's
 10 authority over management of state waters and other natural
 11 resources and to conserve water for existing and future
 12 beneficial uses by Montanans.

13 THEREFORE, the Legislature of the State of Montana
 14 finds that this legislation and other recommendations of the
 15 Select Committee on Water Marketing constitute an
 16 appropriate revision of state water policy necessary to
 17 secure Montana's interests for present and future benefit to
 18 Montanans.

19
 20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

21 Section 1. Section 85-2-102, MCA, is amended to read:

22 "85-2-102. Definitions. Unless the context requires
 23 otherwise, in this chapter the following definitions apply:

24 (1) "Appropriate" means to divert, impound, or
 25 withdraw (including by stock for stock water) a quantity of

1 water or, in the case of a public agency, to reserve water
2 in accordance with 85-2-316.

3 (2) "Beneficial use", unless otherwise provided,
4 means:

5 (a) a use of water for the benefit of the
6 appropriator, other persons, or the public, including but
7 not limited to agricultural (including stock water),
8 domestic, fish and wildlife, industrial, irrigation, mining,
9 municipal, power, and recreational uses; and

10 (b) a use of water appropriated by the department for
11 the state water leasing program under [section 14] and of
12 water leased under a valid lease issued by the department
13 under [section 14].

14 (3) "Board" means the board of natural resources and
15 conservation provided for in 2-15-3302.

16 (4) "Certificate" means a certificate of water right
17 issued by the department.

18 (5) "Change in appropriation right" means a change in
19 the place of diversion, the place of use, the purpose of
20 use, or the place of storage.

21 (6) "Declaration" means the declaration of an
22 existing right filed with the department under section 8,
23 Chapter 452, Laws of 1973.

24 (7) "Department" means the department of natural
25 resources and conservation provided for in Title 2, chapter

1 15, part 33.

2 (8) "Existing right" means a right to the use of
3 water which would be protected under the law as it existed
4 prior to July 1, 1973.

5 (9) "Groundwater" means any water beneath the land
6 surface or beneath the bed of a stream, lake, reservoir, or
7 other body of surface water, and which is not a part of that
8 surface water.

9 (10) "Permit" means the permit to appropriate issued
10 by the department under 85-2-301 through 85-2-303 and
11 85-2-306 through 85-2-314.

12 (11) "Person" means an individual, association,
13 partnership, corporation, state agency, political
14 subdivision, the United States or any agency thereof, or any
15 other entity.

16 (12) "Political subdivision" means any county,
17 incorporated city or town, public corporation, or district
18 created pursuant to state law or other public body of the
19 state empowered to appropriate water but not a private
20 corporation, association, or group.

21 (13) ~~"Slurry" means a mixture of water and insoluble~~
22 ~~material.~~

23 (14) "Waste" means the unreasonable loss of water
24 through the design or negligent operation of an
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 (14) "Water" means all water of the state, surface and
3 subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

6 (15) "Water division" means a drainage basin as defined
7 in 3-7-102.

8 (16) "Water judge" means a judge as provided for in
9 Title 3, chapter 7.

10 (17) "Water master" means a master as provided for in
11 Title 3, chapter 7.

12 (18) "Well" means any artificial opening or excavation
13 in the ground, however made, by which groundwater is sought
14 or can be obtained or through which it flows under natural
15 pressures or is artificially withdrawn."

16 Section 2. Section 85-1-204, MCA, is amended to read:

17 "85-1-204. Department powers over state waters. (1)
18 The department, with the approval of the board, may sell,
19 lease, and otherwise dispose of all waters which may be
20 impounded under this chapter, and the water may be sold for
21 the purpose of irrigation, development of power, watering of
22 stock, or any other purpose. The department may also lease
23 water under the state water leasing program established
24 under the provisions of [section 14]. To the extent that it
25 may be necessary to carry out this chapter and subject to a

1 compliance with the other provisions of this chapter, the
2 department has full control of all the water of the state
3 not under the exclusive control of the United States and not
4 vested in private ownership, and it shall take such steps as
5 may be necessary to appropriate and conserve the same for
6 the use of the people. The authority of the department
7 conferred by this chapter extends and applies to rights to
8 the natural flow of the waters of this state which it may
9 acquire, with the approval of the board, by condemnation,
10 purchase, exchange, appropriation, or agreement.

11 (2) For the purpose of regulating the diversion of
12 those waters, the department may enter upon the means and
13 place of use of all appropriators for making surveys of
14 respective rights and seasonal needs.

15 (3) The department may take into consideration the
16 decrees of the courts of this state having jurisdiction
17 which purport to adjudicate the waters of a stream or its
18 tributaries, and a fair, reasonable, and equitable
19 reconciliation shall be made between the claimants asserting
20 rights under different decrees and between decreed rights
21 and asserted rights of appropriation not adjudicated by any
22 court.

23 (4) The department, at its discretion, may hold
24 hearings relating to the rights of respective claimants
25 after first giving such notice as it considers appropriate

and make findings of the date and quantity of appropriation and use of all claimants which the department will recognize and observe in diverting the waters which it owns. The department may police and distribute to the owner of the recognized appropriation the waters due him upon request and under terms agreed upon.

(5) The department, when engaged in controlling and dividing the natural flow of a stream under the authority granted by this chapter, is exercising a police power of the state, and water commissioners appointed by any court may not deprive the department of any of the waters owned or administered under agreement with respective owners. The owner of a prior right contending that the department is not recognizing and respecting the appropriation may resort to a court for the purpose of determining whether or not the rights of the claimant have been invaded, and the department shall observe the terms of the final decree.

(6) When the department impounds or acquires the right of appropriation of the waters of a stream it may divert or authorize the diversion at any point on the stream or any portion thereof when it is done without injury to a prior appropriator."

Section 3. Section 85-2-301, MCA, is amended to read:

"85-2-301. Right to appropriate. (1) After July 1, 1973, a person may not appropriate water except as provided

in this chapter. A person may only appropriate water for a beneficial use.

(2) (a) Only the department may appropriate water by permit under 85-2-311 in either of the following instances:

(i) for transport outside the following river basins:

(A) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(B) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(C) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(F) the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use, is to be consumed.

(b) Water for these purposes or in these amounts may be leased from the department by any person under the provisions of [section 14].

(3) A right to appropriate water may not be acquired by any other method, including by adverse use, adverse

possession, prescription, or estoppel. The method prescribed by this chapter is exclusive."

Section 4. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) ~~and~~ ~~through~~ (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

(2) ~~The~~ The department may not issue a permit for an

appropriation of ~~16,000~~ 4,000 or more acre-feet of water a year ~~or 15~~ and 5.5 or more cubic feet per second of water unless ~~it affirmatively finds~~ the applicant proves by clear and convincing evidence that:

~~(i)~~ (a) the criteria in subsection (1) are met;

~~(ii)~~ (b) ~~the applicant has proven by clear and convincing evidence that~~ the rights of a prior appropriator will not be adversely affected;

~~(iii)~~ (c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

~~(A)~~ (i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

~~(B)~~ (ii) the benefits to the applicant and the state;

~~(C)~~ the economic feasibility of the project;

~~(B)~~ (iii) the effects on the quantity, and quality, ~~and~~ potability of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

~~(E)~~ (v) the effects on private property rights by any

creation of or contribution to saline seep; and

(F)(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(b)--A permit for an appropriation for a diversion for a consumptive use of 10,000 or more acre-feet of water a year or 15 or more cubic feet per second of water under this subsection may not be issued unless the department petitions the legislature and the legislature affirms the findings of the department.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or

consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of

1 water.

2 ~~{3}~~(4) An appropriation, diversion, impoundment, use,
3 restraint, or attempted appropriation, diversion,
4 impoundment, use, or restraint contrary to the provisions of
5 this section is ~~null-and-void~~ invalid. No officer, agent,
6 agency, or employee of the state may knowingly permit, aid,
7 or assist in any manner such unauthorized appropriation,
8 diversion, impoundment, use, or other restraint. No person
9 or corporation may, directly or indirectly, personally or
10 through an agent, officer, or employee, attempt to
11 appropriate, divert, impound, use, or otherwise restrain or
12 control waters within the boundaries of this state except
13 in accordance with this section."

14 Section 5. Section 85-2-312, MCA, is amended to read:

15 "85-2-312. Terms of permit. (1) The department may
16 issue a permit for less than the amount of water requested,
17 but in no case may it issue a permit for more water than is
18 requested or than can be beneficially used without waste for
19 the purpose stated in the application. The department may
20 require modification of plans and specifications for the
21 appropriation or related diversion or construction. ~~It Based~~
22 upon the criteria listed in 85-2-311, the department may
23 issue a permit subject to terms, conditions, restrictions,
24 and limitations it considers necessary ~~to protect the rights~~
25 ~~of other appropriators~~, and it may issue temporary or

1 seasonal permits. A permit shall be issued subject to
2 existing rights and any final determination of those rights
3 made under this chapter.

4 (2) The department may limit the time for commencement
5 of the appropriation works, completion of construction, and
6 actual application of the water to the proposed beneficial
7 use. In fixing those time limits, the department shall
8 consider the cost and magnitude of the project, the
9 engineering and physical features to be encountered, and, on
10 projects designed for gradual development and gradually
11 increased use of water, the time reasonably necessary for
12 that gradual development and increased use. For good cause
13 shown by the permittee, the department may in its discretion
14 reasonably extend time limits.

15 (3) The original of the permit shall be sent to the
16 permittee, and a copy shall be kept in the office of the
17 department in Helena.

18 (4) The department shall provide to the county clerk
19 and recorder of the county wherein the point of diversion or
20 place of use is located quarterly reports and an annual
21 summary report of all water right permits, certificates, and
22 change approvals issued by the department within the
23 county."

24 Section 6. Section 85-2-124, MCA, is amended to read:

25 "85-2-124. Fees for environmental impact statements.

1 (1) Whenever the department determines that the filing of an
 2 application (or a combination of applications) for a permit
 3 or approval under this chapter requires the preparation of
 4 an environmental impact statement as prescribed by the
 5 Montana Environmental Policy Act and the application (or
 6 combination of applications) involves the use of ~~10,000~~
 7 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic
 8 feet per second of water, the applicant shall pay to the
 9 department the fee prescribed in this section. The
 10 department shall notify the applicant in writing within 90
 11 days of receipt of a correct and complete application (or a
 12 combination of applications) if it determines that an
 13 environmental impact statement and fee is required.

14 (2) Upon notification by the department under
 15 subsection (1), the applicant shall pay a fee based upon the
 16 estimated cost of constructing, repairing, or changing the
 17 appropriation and diversion facilities as herein provided.
 18 The maximum fee that shall be paid to the department may not
 19 exceed the fees set forth in the following declining scale:
 20 2% of the estimated cost up to \$1 million; plus 1% of the
 21 estimated cost over \$1 million and up to \$20 million; plus
 22 1/2 of 1% of the estimated cost over \$20 million and up to
 23 \$100 million; plus 1/4 of 1% of the estimated cost over \$100
 24 million and up to \$300 million; plus 1/8 of 1% of the
 25 estimated cost over \$300 million. The fee shall be

1 deposited in the state special revenue fund to be used by
 2 the department only to comply with the Montana Environmental
 3 Policy Act in connection with the application(s). Any
 4 amounts paid by the applicant but not actually expended by
 5 the department shall be refunded to the applicant.

6 (3) The department and the applicant may determine by
 7 agreement the estimated cost of any facility for purposes of
 8 computing the amount of the fee to be paid to the department
 9 by the applicant. The department may contract with an
 10 applicant for:

11 (a) the development of information by the applicant or
 12 a third party on behalf of the department and the applicant
 13 concerning the environmental impact of any proposed activity
 14 under an application;

15 (b) the division of responsibility between the
 16 department and an applicant for supervision over, control
 17 of, and payment for the development of information by the
 18 applicant or a third party on behalf of the department and
 19 the applicant under any such contract or contracts;

20 (c) the use or nonuse of a fee or any part thereof
 21 paid to the department by an applicant.

22 (4) Any payments made to the department or any third
 23 party by an applicant under any such contract or contracts
 24 shall be credited against any fee the applicant must pay
 25 hereunder. The department and the applicant may agree on

1 additional credits against the fee for environmental work
2 performed by the applicant at the applicant's own expense.

3 (5) No fee as prescribed by this section may be
4 assessed against an applicant for a permit or approval if
5 the applicant has also filed an application for a
6 certificate of environmental compatibility or public need
7 pursuant to the Montana Major Facility Siting Act and the
8 appropriation or use of water involved in the application(s)
9 for permit or approval has been or will be studied by the
10 department pursuant to that act.

11 (6) This section shall apply to all applications,
12 pending or hereinafter filed, for which the department has
13 not, as of April 9, 1975, commenced writing an environmental
14 impact statement. This section shall not apply to any
15 application, the fee for which would not exceed \$2,500.

16 (7) Failure to submit the fee as required by this
17 section shall void the application(s).

18 (8) The department may in its discretion rely upon the
19 environmental studies, investigations, reports, and
20 assessments made by any other state agency or any person,
21 including any applicant, in the preparation of its
22 environmental impact statement."

23 Section 7. Section 85-2-402, MCA, is amended to read:

24 "85-2-402. Changes in appropriation rights. ~~{1}~~-An
25 appropriator may not change the place of diversion, place of

1 use, purpose of use, or place of storage except as permitted
2 under this section and approved by the department.

3 ~~{2}~~--The department shall approve the proposed change
4 if it determines that the proposed change will not adversely
5 affect the rights of other persons. If the department
6 determines that the proposed change might adversely affect
7 the rights of other persons, notice of the proposed change
8 shall be given in accordance with 85-2-307. If the
9 department determines that an objection filed by a person
10 whose rights may be affected states a valid objection to the
11 proposed change, the department shall hold a hearing thereon
12 prior to its approval or denial of the proposed change.
13 Objections shall meet the requirements of 85-2-308~~{2}~~, and
14 hearings shall be held in accordance with 85-2-309.

15 ~~{3}~~--An appropriator of more than 15 cubic feet per
16 second may not change the purpose of use of an appropriation
17 right from an agricultural or irrigation use to an
18 industrial use.

19 ~~{4}~~--The department may approve a change subject to
20 such terms, conditions, restrictions, and limitations it
21 considers necessary to protect the rights of other
22 appropriators, including limitations on the time for
23 completion of the change.

24 ~~{5}~~--If a change is not completed as approved by the
25 department or if the terms, conditions, restrictions, and

limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(6) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections must meet the requirements of 85-2-308 and hearings must be held in accordance with 85-2-309. (1) An appropriator may not make a change in an appropriation right except as permitted

under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by clear and convincing evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation

1 systems, and minimum streamflows for the protection of
2 existing water rights and aquatic life;

3 (ii) the benefits to the applicant and the state;

4 (iii) the effects on the quantity and quality of water
5 for existing uses in the source of supply;

6 (iv) the availability and feasibility of using
7 low-quality water for the purpose for which application has
8 been made;

9 (v) the effects on private property rights by any
10 creation of or contribution to saline seep; and

11 (vi) the probable significant adverse environmental
12 impacts of the proposed use of water as determined by the
13 department pursuant to Title 75, chapter 1, or Title 75,
14 chapter 20.

15 (4) The department may not approve a change in purpose
16 of use or place of use for a diversion that results in 4,000
17 or more acre-feet of water a year and 5.5 or more cubic feet
18 per second of water being consumed unless:

19 (a) the applicant proves by clear and convincing
20 evidence and the department finds that the criteria in
21 subsections (2) and (3) are met; and

22 (b) the department then petitions the legislature and
23 the legislature affirms the decision of the department after
24 a public hearing.

25 (5) (a) The state of Montana has long recognized the

1 importance of conserving its public waters and the necessity
2 to maintain adequate water supplies for the state's water
3 requirements. Although the state of Montana also recognizes
4 that, under appropriate conditions, the out-of-state
5 transportation and use of its public waters are not in
6 conflict with the public welfare of its citizens or the
7 conservation of its waters, the following criteria must be
8 met before out-of-state use may occur:

9 (b) The department and, if applicable, the legislature
10 may not approve a change in appropriation right for the
11 withdrawal and transportation of appropriated water for use
12 outside the state unless the appropriator proves by clear
13 and convincing evidence and, if applicable, the legislature
14 approves after a public hearing that:

15 (i) depending on the volume of water diverted or
16 consumed, the applicable criteria and procedures of
17 subsection (2) or (3) are met;

18 (ii) the proposed out-of-state use of water is not
19 contrary to water conservation in Montana; and

20 (iii) the proposed out-of-state use of water is not
21 otherwise detrimental to the public welfare of the citizens
22 of Montana.

23 (c) In determining whether the appropriator has proved
24 by clear and convincing evidence that the requirements of
25 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

1 department and, if applicable, the legislature shall
2 consider the following factors:

3 (i) whether there are present or projected water
4 shortages within the state of Montana;

5 (ii) whether the water that is the subject of the
6 proposed change in appropriation might feasibly be
7 transported to alleviate water shortages within the state of
8 Montana;

9 (iii) the supply and sources of water available to the
10 applicant in the state where the applicant intends to use
11 the water; and

12 (iv) the demands placed on the applicant's supply in
13 the state where the applicant intends to use the water.

14 (d) When applying for a change in appropriation right
15 to withdraw and transport water for use outside the state,
16 the applicant shall submit to and comply with the laws of
17 the state of Montana governing the appropriation and use of
18 water.

19 (6) For any application for a change in appropriation
20 right involving 4,000 or more acre-feet of water a year and
21 5.5 or more cubic feet per second of water, the department
22 shall give notice of the proposed change in accordance with
23 85-2-307 and shall hold a hearing in accordance with
24 85-2-309 prior to its approval or denial of the proposed
25 change. The department shall provide notice and may hold a

1 hearing upon any other proposed change if it determines that
2 such a change might adversely affect the rights of other
3 persons.

4 (7) The department or the legislature, if applicable,
5 may approve a change subject to such terms, conditions,
6 restrictions, and limitations as it considers necessary to
7 protect the rights of other persons and satisfy the criteria
8 of this section, including limitations on the time for
9 completion of the change.

10 (8) If a change is not completed as approved by the
11 department or legislature or if the terms, conditions,
12 restrictions, and limitations of the change approval are not
13 complied with, the department may, after notice and
14 opportunity for hearing, require the appropriator to show
15 cause why the change approval should not be modified or
16 revoked. If the appropriator fails to show sufficient
17 cause, the department may modify or revoke the change
18 approval.

19 †7†(9) The original of a change approval issued by the
20 department must be sent to the applicant, and a duplicate
21 must be kept in the office of the department in Helena.

22 †8†(10) A person holding an issued permit or change
23 approval that has not been perfected may change the place of
24 diversion, place of use, purpose of use, or place of storage
25 by filing an application for change pursuant to this

1 section.

2 (11) A change in appropriation right contrary to the
3 provisions of this section is invalid. No officer, agent,
4 agency, or employee of the state may knowingly permit, aid,
5 or assist in any manner such unauthorized change in
6 appropriation right. No person or corporation may, directly
7 or indirectly, personally or through an agent, officer, or
8 employee, attempt to change an appropriation right except in
9 accordance with this section."

10 Section 8. Section 75-20-104, MCA, is amended to read:

11 "75-20-104. Definitions. In this chapter, unless the
12 context requires otherwise, the following definitions apply:

13 (1) "Addition thereto" means the installation of new
14 machinery and equipment which would significantly change the
15 conditions under which the facility is operated.

16 (2) "Application" means an application for a
17 certificate submitted in accordance with this chapter and
18 the rules adopted hereunder.

19 (3) "Associated facilities" includes but is not
20 limited to transportation links of any kind, aqueducts,
21 diversion dams, transmission substations, storage ponds,
22 reservoirs, and any other device or equipment associated
23 with the production or delivery of the energy form or
24 product produced by a facility, except that the term does
25 not include a facility.

1 (4) "Board" means the board of natural resources and
2 conservation provided for in 2-15-3302.

3 (5) "Board of health" means the board of health and
4 environmental sciences provided for in 2-15-2104.

5 (6) "Certificate" means the certificate of
6 environmental compatibility and public need issued by the
7 board under this chapter that is required for the
8 construction or operation of a facility.

9 (7) "Commence to construct" means:

10 (a) any clearing of land, excavation, construction, or
11 other action that would affect the environment of the site
12 or route of a facility but does not mean changes needed for
13 temporary use of sites or routes for nonutility purposes or
14 uses in securing geological data, including necessary
15 borings to ascertain foundation conditions;

16 (b) the fracturing of underground formations by any
17 means if such activity is related to the possible future
18 development of a gasification facility or a facility
19 employing geothermal resources but does not include the
20 gathering of geological data by boring of test holes or
21 other underground exploration, investigation, or
22 experimentation;

23 (c) the commencement of eminent domain proceedings
24 under Title 70, chapter 30, for land or rights-of-way upon
25 or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

(iv) enriching uranium minerals or any addition thereto having an estimated cost in excess of \$10 million; or

(v) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of \$10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length;

(c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section;

(d) each pipeline greater than 17 inches in diameter and 30 miles in length, and associated facilities;

~~(d)~~(e) any use of geothermal resources, including the

1 use of underground space in existence or to be created, for
2 the creation, use, or conversion of energy, designed for or
3 capable of producing geothermally derived power equivalent
4 to 25 million Btu per hour or more or any addition thereto
5 having an estimated cost in excess of \$750,000;

6 ~~(e)~~(f) any underground in situ gasification of coal.

7 (11) "Person" means any individual, group, firm,
8 partnership, corporation, cooperative, association,
9 government subdivision, government agency, local government,
10 or other organization or entity.

11 (12) "Transmission substation" means any structure,
12 device, or equipment assemblage, commonly located and
13 designed for voltage regulation, circuit protection, or
14 switching necessary for the construction or operation of a
15 proposed transmission line.

16 (13) "Utility" means any person engaged in any aspect
17 of the production, storage, sale, delivery, or furnishing of
18 heat, electricity, gas, hydrocarbon products, or energy in
19 any form for ultimate public use."

20 Section 9. Section 75-20-216, MCA, is amended to read:

21 "75-20-216. Study, evaluation, and report on proposed
22 facility -- assistance by other agencies. (1) After receipt
23 of an application, the department and department of health
24 shall within 90 days notify the applicant in writing that:

25 (a) the application is in compliance and is accepted

1 as complete; or

2 (b) the application is not in compliance and list the
3 deficiencies therein; and upon correction of these
4 deficiencies and resubmission by the applicant, the
5 department and department of health shall within 30 days
6 notify the applicant in writing that the application is in
7 compliance and is accepted as complete.

8 (2) Upon receipt of an application complying with
9 75-20-211 through 75-20-215, and this section, the
10 department shall commence an intensive study and evaluation
11 of the proposed facility and its effects, considering all
12 applicable criteria listed in 75-20-301 and 75-20-503 and
13 the department of health shall commence a study to enable it
14 or the board of health to issue a decision, opinion, order,
15 certification, or permit as provided in subsection (3). The
16 department and department of health shall use, to the extent
17 they consider applicable, valid and useful existing studies
18 and reports submitted by the applicant or compiled by a
19 state or federal agency.

20 (3) The department of health shall within 1 year
21 following the date of acceptance of an application and the
22 board of health or department of health, if applicable,
23 within an additional 6 months issue any decision, opinion,
24 order, certification, or permit required under the laws
25 administered by the department of health or the board of

1 health and this chapter. The department of health and the
2 board of health shall determine compliance with all
3 standards, permit requirements, and implementation plans
4 under their jurisdiction for the primary and reasonable
5 alternate locations in their decision, opinion, order,
6 certification, or permit. The decision, opinion, order,
7 certification, or permit, with or without conditions, is
8 conclusive on all matters that the department of health and
9 board of health administer, and any of the criteria
10 specified in subsections (2) through (7) of 75-20-503 that
11 are a part of the determinations made under the laws
12 administered by the department of health and the board of
13 health. Although the decision, opinion, order,
14 certification, or permit issued under this subsection is
15 conclusive, the board retains authority to make the
16 determination required under 75-20-301(2)(c). The decision,
17 opinion, order, certification, or permit of the department
18 of health or the board of health satisfies the review
19 requirements by those agencies and shall be acceptable in
20 lieu of an environmental impact statement under the Montana
21 Environmental Policy Act. A copy of the decision, opinion,
22 order, certification, or permit shall be served upon the
23 department and the board and shall be utilized as part of
24 their final site selection process. Prior to the issuance of
25 a preliminary decision by the department of health and

1 pursuant to rules adopted by the board of health, the
2 department of health shall provide an opportunity for public
3 review and comment.

4 (4) Within 22 months following acceptance of an
5 application for a facility as defined in (a) and ~~(d)~~(e) of
6 75-20-104(10) and for a facility as defined in (b) ~~and (c)~~
7 through (d) of 75-20-104(10) which is more than 30 miles in
8 length and within 1 year for a facility as defined in (b)
9 ~~and (c)~~ through (d) of 75-20-104(10) which is 30 miles or
10 less in length, the department shall make a report to the
11 board which shall contain the department's studies,
12 evaluations, recommendations, other pertinent documents
13 resulting from its study and evaluation, and an
14 environmental impact statement or analysis prepared pursuant
15 to the Montana Environmental Policy Act, if any. If the
16 application is for a combination of two or more facilities,
17 the department shall make its report to the board within the
18 greater of the lengths of time provided for in this
19 subsection for either of the facilities.

20 (5) The departments of highways; commerce; fish,
21 wildlife, and parks; state lands; revenue; and public
22 service regulation shall report to the department
23 information relating to the impact of the proposed site on
24 each department's area of expertise. The report may include
25 opinions as to the advisability of granting, denying, or

modifying the certificate. The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report."

Section 10. Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date -- location -- department to act as staff -- hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. ~~Except--for--those hearings--involving--applications--submitted--for--facilities--as defined--in--(b)--and--(c)--of--75-20-104(10),--certification~~ Certification hearings shall be conducted by the board in the county seat of Lewis and Clark County or the county in which the facility or the greater portion thereof is to be located.

(2) Except as provided in 75-20-221(2), the department shall act as the staff for the board throughout the decisionmaking process and the board may request the department to present testimony or cross-examine witnesses as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of health and the board of health shall hold any required permit hearings required under laws administered by those

agencies in conjunction with the board certification hearing. In such a conjunctive hearing the time periods established for reviewing an application and for issuing a decision on certification of a proposed facility under this chapter supersede the time periods specified in other laws administered by the department of health and the board of health."

Section 11. Section 75-20-303, MCA, is amended to read:

"75-20-303. Opinion issued with decision -- contents. (1) In rendering a decision on an application for a certificate, the board shall issue an opinion stating its reasons for the action taken.

(2) If the board has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restrictive pursuant to 75-20-301(2)(f), it shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include the following:

(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

(i) the environmental impact of the proposed facility;
(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

1 (iii) problems and objections raised by other federal
2 and state agencies and interested groups;

3 (iv) alternatives to the proposed facility;

4 (v) a plan for monitoring environmental effects of the
5 proposed facility; and

6 (vi) a time limit as provided in subsection (4), during
7 which construction of the facility must be completed;

8 (b) a statement signed by the applicant showing
9 agreement to comply with the requirements of this chapter
10 and the conditions of the certificate.

11 (4) The board shall issue as part of the certificate
12 the following time limits during which construction of a
13 facility must be completed:

14 (a) For a facility as defined in (b), or (c), or (d)
15 of 75-20-104(10) that is more than 30 miles in length, the
16 time limit is 10 years.

17 (b) For a facility as defined in (b), or (c), or (d)
18 of 75-20-104(10) that is 30 miles or less in length, the
19 time limit is 5 years.

20 (c) The time limit shall be extended for periods of 2
21 years each upon a showing by the applicant to the board that
22 a good faith effort is being undertaken to complete
23 construction. Under this subsection, a good faith effort to
24 complete construction includes the process of acquiring any
25 necessary state or federal permit or certificate for the

1 facility and the process of judicial review of any such
2 permit or certificate.

3 (5) The provisions of subsection (4) apply to any
4 facility for which a certificate has not been issued or for
5 which construction is yet to be commenced."

6 Section 12. Section 75-20-304, MCA, is amended to
7 read:

8 "75-20-304. Waiver of provisions of certification
9 proceedings. (1) The board may waive compliance with any of
10 the provisions of 75-20-216 through 75-20-222, 75-20-501,
11 and this part if the applicant makes a clear and convincing
12 showing to the board at a public hearing that an immediate,
13 urgent need for a facility exists and that the applicant did
14 not have knowledge that the need for the facility existed
15 sufficiently in advance to fully comply with the provisions
16 of 75-20-216 through 75-20-222, 75-20-501, and this part.

17 (2) The board may waive compliance with any of the
18 provisions of this chapter upon receipt of notice by a
19 utility or person subject to this chapter that a facility or
20 associated facility has been damaged or destroyed as a
21 result of fire, flood, or other natural disaster or as the
22 result of insurrection, war, or other civil disorder and
23 there exists an immediate need for construction of a new
24 facility or associated facility or the relocation of a
25 previously existing facility or associated facility in order

1 to promote the public welfare.

2 (3) The board shall waive compliance with the
3 requirements of subsections (2)(c), (3)(b), and (3)(c) of
4 75-20-301 and 75-20-501(5) and the requirements of
5 subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3),
6 and 75-20-303(3)(a)(iv) relating to consideration of
7 alternative sites if the applicant makes a clear and
8 convincing showing to the board at a public hearing that:

9 (a) a proposed facility will be constructed in a
10 county where a single employer within the county has
11 permanently curtailed or ceased operations causing a loss of
12 250 or more permanent jobs within 2 years at the employer's
13 operations within the preceding 10-year period;

14 (b) the county and municipal governing bodies in whose
15 jurisdiction the facility is proposed to be located support
16 by resolution such a waiver;

17 (c) the proposed facility will be constructed within a
18 15-mile radius of the operations that have ceased or been
19 curtailed; and

20 (d) the proposed facility will have a beneficial
21 effect on the economy of the county in which the facility is
22 proposed to be located.

23 (4) The waiver provided for in subsection (3) applies
24 only to permanent job losses by a single employer. The
25 waiver provided for in subsection (3) does not apply to jobs

1 of a temporary or seasonal nature, including but not limited
2 to construction jobs, or job losses during labor disputes.

3 (5) The waiver provided for in subsection (3) does not
4 apply to consideration of alternatives or minimum adverse
5 environmental impact for a facility defined in subsections
6 (10)(b), (c), (d), (e), or ~~(e)~~ (f) of 75-20-104, for an
7 associated facility defined in subsection (3) of 75-20-104,
8 or for any portion of or process in a facility defined in
9 subsection (10)(a) of 75-20-104 to the extent that the
10 process or portion of the facility is not subject to a
11 permit issued by the department of health or board of
12 health.

13 (6) The applicant shall pay all expenses required to
14 process and conduct a hearing on a waiver request under
15 subsection (3). However, any payments made under this
16 subsection shall be credited toward the fee paid under
17 75-20-215 to the extent the data or evidence presented at
18 the hearing or the decision of the board under subsection
19 (3) can be used in making a certification decision under
20 this chapter.

21 (7) The board may grant only one waiver under
22 subsections (3) and (4) for each permanent loss of jobs as
23 defined in subsection (3)(a)."

24 Section 13. Section 75-20-1202, MCA, is amended to
25 read:

1 "75-20-1202. Definitions. As used in this part and
2 75-20-201 through 75-20-203, the following definitions
3 apply:

4 (1) (a) "Nuclear facility" means each plant, unit, or
5 other facility designed for or capable of:

6 (i) generating 50 megawatts of electricity or more by
7 means of nuclear fission;

8 (ii) converting, enriching, fabricating, or
9 reprocessing uranium minerals or nuclear fuels; or

10 (iii) storing or disposing of radioactive wastes or
11 materials from a nuclear facility.

12 (b) "Nuclear facility" does not include any
13 small-scale facility used solely for educational, research,
14 or medical purposes not connected with the commercial
15 generation of energy.

16 (2) "Facility", as defined in 75-20-104~~77~~(10), is
17 further defined to include any nuclear facility as defined
18 in subsection (1)(a) of this section."

19 NEW SECTION. Section 14. Water leasing program. (1)
20 There is a water leasing program administered by the
21 department on behalf of the state of Montana.

22 (2) The department may acquire rights to water needed
23 for leasing under this program through appropriation of
24 water in its own name or by agreement with or purchase from
25 another holder of water rights.

1 (3) Water for leasing under the water leasing program
2 must be obtained from the following sources:

3 (a) any existing or future reservoir in a basin
4 concerning which a temporary preliminary decree, a
5 preliminary decree under 85-2-231, or a final decree under
6 85-2-234 has been entered;

7 (b) Fort Peck Reservoir, if an agreement between the
8 department and the federal government concerning the
9 acquisition of water and the sharing of revenues with the
10 state is in effect;

11 (c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail
12 Reservoirs if and for so long as there is an agreement
13 between the department and the federal government concerning
14 the acquisition of water and sharing of revenues with the
15 state from one or more of these reservoirs; and

16 (d) any other existing or future federal reservoir:

17 (i) located in a basin concerning which a temporary
18 preliminary decree, a preliminary decree under 85-2-231, or
19 a final decree under 85-2-234 has been entered; and

20 (ii) for which and for so long as there is an agreement
21 between the department and the federal government concerning
22 the acquisition of water and the sharing of revenues with
23 the state.

24 (4) Water may be leased for any beneficial use. The
25 amount of water that can be leased under this program for

1 all beneficial uses shall not exceed 50,000 acre-feet.

2 (5) The term of any lease may not exceed 50 years. A
3 term may be extended up to another 50 years if the
4 department again determines the desirability of leasing by
5 applying the considerations set forth in subsection (7). In
6 making such a redetermination, the department may require
7 the completion of an environmental impact statement in
8 accordance with subsection (6).

9 (6) The department shall require the completion of an
10 environmental impact statement under the provisions of Title
11 75, chapter 1, for lease applications that would result in
12 the consumption of 4,000 acre-feet a year or more and 5.5
13 cubic feet per second or more of water and for any other
14 application for which an environmental impact statement is
15 required by law. The department shall require the
16 completion of an environmental impact statement whenever the
17 cumulative effect of more than one application for a lease
18 would constitute a probable significant environmental
19 impact.

20 (7) Upon application by any person to lease water, the
21 department shall make an initial determination of whether it
22 is desirable for the department to lease water to the
23 applicant. Such a determination of desirability shall be
24 made solely on the following considerations:

25 (a) the content of the environmental impact statement,

1 if required;

2 (b) whether there is sufficient water available under
3 the water leasing program; and

4 (c) whether the criteria, except as to legislative
5 approval, set forth in 85-2-311 have been satisfied.

6 (8) The department shall for any agreement require
7 commercially reasonable terms and conditions, which may
8 include the requirement that up to 25% of the water to be
9 leased be made available to a potential user for any
10 beneficial use upon payment by such user of the costs of
11 tapping into and removing water from the applicant's
12 project. The department may differentiate in pricing,
13 depending on the proposed beneficial use of the water.

14 (9) The lease of water or the use of water under a
15 lease does not constitute a permit as provided in 85-2-102
16 and does not establish a right to appropriate water within
17 the meaning of Title 85, chapter 2, part 3.

18 (10) For purposes of the water leasing program
19 established in this section, it is the intent of the
20 legislature that the state act as a proprietor.

21 Section 15. Section 85-1-205, MCA, is amended to read:

22 "85-1-205. Acquisition of water in federal reservoirs.

23 {1} The department may acquire water or water storage by
24 purchase option or agreement with the federal government
25 from any federal reservoir for the purpose of sale, rent, or

distribution for ~~industrial and other~~ uses any beneficial use. In such cases, the department is not required to construct any diversion or appropriation facilities or works, and it may sell, rent, or distribute such water at such rates and under such terms and conditions as it considers appropriate, ~~except as provided in subsection (2).~~

~~(2) -- Until a final decree has been issued pursuant to 85-2-234 concerning the waters in a federal reservoir, the department may sell, rent, or distribute such water only after a permit has been issued to an applicant for purchase, rent, or distribution of water in accordance with part 3 of this chapter.~~

Section 16. Section 85-2-316, MCA, is amended to read:

"85-2-316. Reservation of waters. (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Water may be reserved only for existing or future beneficial uses in the following river basins:

(a) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(b) the Kootenai River and its tributaries to its

confluence with Kootenay Lake in British Columbia;

(c) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(d) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(e) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(f) the Yellowstone River to its confluence with the Missouri River in North Dakota.

~~(2)(3)~~ Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

~~(3)(4)~~ (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

1 ~~(a)~~(i) the purpose of the reservation;
 2 ~~(b)~~(ii) the need for the reservation;
 3 ~~(c)~~(iii) the amount of water necessary for the purpose
 4 of the reservation;
 5 ~~(d)~~(iv) that the reservation is in the public interest.
 6 (b) In determining the public interest under
 7 subsection (4)(a)(iv), the board may not adopt an order
 8 reserving water for withdrawal and transport for use outside
 9 the state unless the applicant proves by clear and
 10 convincing evidence that:
 11 (i) the proposed out-of-state use of water is not
 12 contrary to water conservation in Montana; and
 13 (ii) the proposed out-of-state use of water is not
 14 otherwise detrimental to the public welfare of the citizens
 15 of Montana.
 16 (c) In determining whether the applicant has proved by
 17 clear and convincing evidence that the requirements of
 18 subsections (4)(b)(i) and (4)(b)(ii) are met, the board
 19 shall consider the following factors:
 20 (i) whether there are present or projected water
 21 shortages within the state of Montana;
 22 (ii) whether the water that is the subject of the
 23 application could feasibly be transported to alleviate water
 24 shortages within the state of Montana;
 25 (iii) the supply and sources of water available to the

1 applicant in the state where the applicant intends to use
 2 the water; and
 3 (iv) the demands placed on the applicant's supply in
 4 the state where the applicant intends to use the water.
 5 (d) When applying for a reservation to withdraw and
 6 transport water for use outside the state, the applicant
 7 shall submit to and comply with the laws of the state of
 8 Montana governing the appropriation, lease, use, and
 9 reservation of water.
 10 ~~(4)~~(5) If the purpose of the reservation requires
 11 construction of a storage or diversion facility, the
 12 applicant shall establish to the satisfaction of the board
 13 that there will be progress toward completion of the
 14 facility and accomplishment of the purpose with reasonable
 15 diligence in accordance with an established plan.
 16 ~~(5)~~(6) The board shall limit any reservations after
 17 May 9, 1979, for maintenance of minimum flow, level, or
 18 quality of water that it awards at any point on a stream or
 19 river to a maximum of 50% of the average annual flow of
 20 record on gauged streams. Ungauged streams can be allocated
 21 at the discretion of the board.
 22 ~~(6)~~(7) After the adoption of an order reserving
 23 waters, the department may reject an application and refuse
 24 a permit for the appropriation of reserved waters or may,
 25 with the approval of the board, issue the permit subject to

1 such terms and conditions it considers necessary for the
2 protection of the objectives of the reservation.

3 ~~(7)~~(8) Any person desiring to use water reserved to a
4 conservation district for agricultural purposes shall make
5 application for such use with the district, and the district
6 upon approval of the application must inform the department
7 of the approved use. The department shall maintain records
8 of all uses of water reserved to conservation districts and
9 be responsible, when requested by the districts, for
10 rendering technical and administrative assistance within the
11 department's staffing and budgeting limitations in the
12 preparation and processing of such applications for the
13 conservation districts. The department shall, within its
14 staffing and budgeting limitations, complete any feasibility
15 study requested by the districts within 12 months of the
16 time the request was made. The board shall extend the time
17 allowed to develop a plan identifying projects for utilizing
18 a district's reservation so long as the conservation
19 district makes a good faith effort, within its staffing and
20 budget limitations, to develop a plan.

21 ~~(8)~~(9) A reservation under this section shall date
22 from the date the order reserving the water is adopted by
23 the board and shall not adversely affect any rights in
24 existence at that time.

25 ~~(9)~~(10) The board shall, periodically but at least once

1 every 10 years, review existing reservations to ensure that
2 the objectives of the reservation are being met. Where the
3 objectives of the reservation are not being met, the board
4 may extend, revoke, or modify the reservation.

5 ~~(10)~~(11) The board may modify an existing or future
6 order originally adopted to reserve water for the purpose of
7 maintaining minimum flow, level, or quality of water, so as
8 to reallocate such reservation or portion thereof to an
9 applicant who is a qualified reservant under this section.
10 Reallocation of reserved water may be made by the board
11 following notice and hearing wherein the board finds that
12 all or part of the reservation is not required for its
13 purpose and that the need for the reallocation has been
14 shown by the applicant to outweigh the need shown by the
15 original reservant. Reallocation of reserved water shall not
16 adversely affect the priority date of the reservation, and
17 the reservation shall retain its priority date despite
18 reallocation to a different entity for a different use. The
19 board may not reallocate water reserved under this section
20 on any stream or river more frequently than once every 5
21 years.

22 ~~(11)~~(12) Nothing in this section vests the board with
23 the authority to alter a water right that is not a
24 reservation.

25 (13) The department shall undertake a program to

educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(14) Water reserved under this section is not subject to the state water leasing program established under [section 14]."

NEW SECTION. Section 17. Reservations within Missouri River basin. (1) The state or any agency or political subdivision thereof or the United States or any agency thereof that desires to apply for a reservation of water in the Missouri River basin shall file a claim pursuant to 85-2-316 no later than July 1, 1987.

(2) The department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for reservations within the Missouri River basin.

(3) Before December 31, 1989, the board shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1987, for reservations of water in the Missouri River basin.

(4) Water reservations approved by the board under

this section have a priority date of July 1, 1985. The board shall by order establish the relative priority of applications approved under this section.

Section 18. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other

interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system.

~~(4)~~(5) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

~~(5)~~(6) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing claims of existing rights with a district court under this chapter;

~~(6)~~(7) adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins as provided in 85-2-319."

Section 19. Section 85-1-203, MCA, is amended to read:

"85-1-203. State water plan. (1) The department shall gather from any source reliable information relating to Montana's water resources and prepare therefrom a continuing comprehensive inventory of the water resources of the state. In preparing this inventory, the department may conduct studies; adopt studies made by other competent water resource groups, including federal, regional, state, or

private agencies; perform research or employ other competent agencies to perform research on a contract basis; and hold public hearings in affected areas at which all interested parties shall be given an opportunity to appear.

(2) The department shall formulate and, with the approval of the board, adopt and from time to time amend, extend, or add to a comprehensive, coordinated multiple-use water resources plan known as the "state water plan". The state water plan may be formulated and adopted in sections, these sections corresponding with hydrologic divisions of the state. The state water plan shall set out a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses. Before adoption of the state water plan or any section thereof, the department shall hold public hearings in the state or in an area of the state encompassed by a section thereof if adoption of a section is proposed. Notice of the hearing or hearings shall be published for 2 consecutive weeks in a newspaper of general county circulation in each county encompassed by the proposed plan or section thereof at least 30 days prior to the hearing.

(3) The department shall submit to the water policy

1 committee established in [section 21] and to each general
 2 session of the legislature the state water plan or any
 3 section thereof or amendments, additions, or revisions
 4 thereto which the department has formulated and adopted.

5 (4) The department shall prepare a continuing
 6 inventory of the groundwater resources of the state. The
 7 groundwater inventory shall be included in the comprehensive
 8 water resources inventory described in subsection (1) above
 9 but shall be a separate component thereof.

10 (5) The department shall publish the comprehensive
 11 inventory, the state water plan, the groundwater inventory,
 12 or any part of each, and the department may assess and
 13 collect a reasonable charge for these publications.

14 (6) In developing and revising the state water plan as
 15 provided in this section, the department shall consult with
 16 the water policy committee established in [section 21] and
 17 solicit the advice of the committee in carrying out its
 18 duties under this section."

19 Section 20. Section 85-1-621, MCA, is amended to read:

20 "85-1-621. Report to the legislature. The department
 21 shall prepare a biennial report to the legislature
 22 describing the status of the water development program. The
 23 report must describe ongoing projects and activities and
 24 those which have been completed during the biennium. The
 25 report must identify and rank in order of priority the

1 projects for which the department desires to seek
 2 congressional authorization and funding and the efforts the
 3 department will undertake in attempting to secure such
 4 authorization and funding. The report must also describe
 5 proposed projects and activities for the coming biennium and
 6 recommendations for necessary appropriations. A copy of the
 7 report shall be submitted to the president of the senate and
 8 the speaker of the house, to the members of the water policy
 9 committee established in [section 21], and to such other
 10 members of the legislature as may request a copy."

11 NEW SECTION. Section 21. Water policy committee.

12 (1) There is a permanent water policy committee of the
 13 legislature. The committee consists of eight members. The
 14 senate committee on committees and the speaker of the house
 15 of representatives shall each appoint four members on a
 16 bipartisan basis. The committee shall elect its chairman
 17 and vice-chairman. The committee shall meet as often as
 18 necessary, including during the interim between sessions, to
 19 perform the duties specified within this section.

20 (2) On a continuing basis, the committee shall:

21 (a) advise the legislature on the adequacy of the
 22 state's water policy and of important state, regional,
 23 national, and international developments which affect
 24 Montana's water resources;

25 (b) oversee the policies and activities of the

department of natural resources and conservation, other state executive agencies, and other state institutions, as they affect the water resources of the state; and

(c) communicate with the public on matters of water policy as well as the water resources of the state.

(3) On a regular basis, the committee shall:

(a) analyze and comment on the state water plan required by 85-1-203, when filed by the department;

(b) analyze and comment on the report of the status of the state's water development program required by 85-1-621, when filed by the department;

(c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university;

(d) analyze, verify, and comment on the adequacy of and information contained in the water resources data management system maintained by the department under 85-2-112; and

(e) report to the legislature, not less than once every biennium.

(4) The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to receiving assistance from the environmental quality council, in carrying out its duties under this section.

Section 22. Section 85-2-122, MCA, is amended to read:

"85-2-122. Penalties. A person who violates or refuses or neglects to comply with 85-2-301, 85-2-402, and 85-2-403, the provisions of this chapter, any order of the department, or any rule of the board is guilty of a misdemeanor."

NEW SECTION. Section 23. Extension of authority. Any existing authority of the board and the department of natural resources and conservation to make rules on the subject of the provisions of this act is extended to the provisions of this act.

Section 24. Section 7, Chapter 706, Laws of 1983, is amended to read:

"Section 7. Termination date. ~~This act~~ Section 4 of [this act] terminates July 1, 1985. The other sections do not terminate and are permanent law."

NEW SECTION. Section 25. Repealer. Section 85-2-104, MCA, is repealed.

NEW SECTION. Section 26. Codification instruction. Sections 14, 17, and 21 are intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to sections 14, 17, and 21.

NEW SECTION. Section 27. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is

1 invalid in one or more of its applications, the part remains
2 in effect in all valid applications that are severable from
3 the invalid applications.

4 NEW SECTION. Section 28. Applicability. This act
5 applies to all permit applications, change in appropriation
6 right applications, water sales and lease applications, and
7 reservation applications filed and pending with the
8 department on July 1, 1985, but upon which a hearing under
9 Title 85, chapter 2, has not yet commenced.

10 NEW SECTION. Section 29. Effective date. This act is
11 effective July 1, 1985.

-End-

FISCAL NOTE

Form BD-15

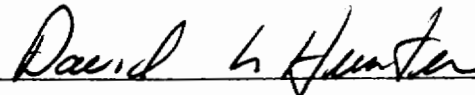
In compliance with a written request received March 15, 19 85, there is hereby submitted a Fiscal Note for House Bill 680 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA). Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

House Bill 680 establishes a comprehensive mechanism that will allow Montana to properly control the allocation and use of its water resources. The bill broadens the criteria for evaluating applications submitted pursuant to the Water Use Act; authorizes a water leasing program to be administered by the Department of Natural Resources and Conservation (DNRC); subjects pipelines of certain sizes to certification under the Major Facility Siting Act; calls for the completion of a basin-wide water reservation proceeding in the Missouri Basin of Montana. Directs the DNRC to develop a water resources data management system, seek federal funding for water project development in Montana, and increase efforts to develop the state water plan.

ASSUMPTIONS:

1. Existing staff and funding resources (including applicant filing fees, etc.) are sufficient for DNRC administration of revised provisions in the water use and Major Facility Siting Acts.
2. Additional DNRC staff and funding will be needed to implement the other provisions of the bill.
3. The proposed budget only covers the expense of preparing applications for water reservations in the Missouri Basin. The funds needed to process the applications (i.e., hearings, EIS, etc.) will be appropriated during the 1988-89 biennium.
4. The budget includes the contracted services funding needed to assure that interested municipalities and conservation districts can prepare adequate water reservation applications. Applications will be submitted by 25 conservation districts and 12 municipalities. The expense of preparing such applications will be equivalent to \$12,000 per conservation district and \$5,000 per municipality.
5. Revenue will, in time, be derived from the water leasing program authorized by the bill. Such revenues will not be forthcoming during the 1986-87 biennium.



BUDGET DIRECTOR
Office of Budget and Program Planning

Date: March 20, 1985
HB 680

FISCAL IMPACT:

		<u>FY 86</u>		<u>FY 87</u>		
<u>Expenditures</u>		<u>Current</u>	<u>Proposed</u>	<u>Current</u>	<u>Proposed</u>	
Personal Services	\$	-0-	\$180,930	\$	-0-	\$142,650
Operating Expenses		-0-	275,100		-0-	306,350
Total Cost	\$	-0-	\$456,030	\$	-0-	\$449,000
General Fund	\$	-0-	\$389,530	\$	-0-	\$372,500
State Special	\$	-0-	\$ 16,225	\$	-0-	\$ 19,125
Federal Special	\$	-0-	\$ 49,875	\$	-0-	\$ 57,375

EFFECT ON COUNTY OR OTHER LOCAL REVENUE:

None

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

Committing funding to do the application phase of the Missouri Basin reservation proceeding will require an additional appropriation for the 1988-89 biennium in order to complete the process (i.e., preparation of environmental impact statement, hearings, etc.).

TECHNICAL OR MECHANICAL DEFECTS OR CONFLICTS WITH EXISTING LEGISLATION:

None.

EXPLANATORY NOTE:

A separate appropriation bill being drafted by the Environmental Quality Council will include the expenditures presented in this fiscal note. That appropriation measure will also include projected costs of implementing other recommendations of the Interim Select Legislative Committee on Water Marketing.

(To be kept current -- post bills when entering being heard or leaving committee.)

Form CS-32

STATUS SHEET

49TH

LEGISLATIVE SESSION

COMMITTEE ON NATURAL RESOURCES

BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
HB 633	2/2/85	2/8/85	2/8/85	2/8/85					
HB 637	2/2/85	2/20/85	2/20	2/20					
HB 638	2/2	2/20	2/20	2/20					
HB 670	2/5/85	2/20	2/20	2/20					
HB 676	2/5/85	2/11 2/22 2/23	2/23			2/23			
HB 680	2/5/85	2/18 2/20	2/20			2/20			
HB 695	2/6/85	2/11/85	2/11/85			2/11/85			
HB 698	2/7/85	2/15/85	2/15			2/15/85			
HB 711	2/7/85	2/20	2/20			2/20			
HB 750	2/11/85	2/20 2/22	2/22	2/22					
HB 755	2/11/85	2/15	2/15	2/15					
HB 766	2/11/85	2/20 2/22	2/22	2/22					
HB 768	2/14/85	2/23	2/23			2/23			
HB 769	2/11/85	2/15	2/15	2/15					
HB 784	2/11/85	2/15	2/15	2/15					
HB 786	2/11/85	2/20	2/20			2/20			

Use a separate sheet for Senate, House Bills, and Resolutions

MINUTES OF THE MEETING
NATURAL RESOURCES COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 18, 1985

The meeting of the House Natural Resources Committee was called to order by vice-chairman Mike Kadas at 7:10 p.m. on February 18, 1985, in Room 325 of the State Capitol.

ROLL CALL: All members of the committee were present.

HOUSE BILL 680: House Bill 680, the "water policy bill," was introduced by its sponsor, Rep. Dennis Iverson, District 12. Rep. Iverson explained that HB 680 is the product of two years of work by the select committee on water marketing. He noted that HB 680 is not, however, a water marketing bill, but a much broader plan for management of the state's water resources. He submitted a copy of the summary of the report of the select committee, which is attached hereto as Exhibit 1.

The select committee was formed through the direction of HB 908, passed by the 48th legislature to address the state's water policy. The intent of that bill was to develop a means of protecting the state's water from improper use, within Montana's boundaries or outside them, Rep. Iverson said.

HB 680 addresses three main areas of water management:

- 1) regulating the interstate movement of water;
- 2) the state water leasing program; and
- 3) maximizing Montana's share of Missouri River basin water.

Within each of these three main categories are several sub-categories, which were outlined for the committee by Rep. Iverson. The attached summary report (Exhibit 1) provides detailed information.

Rep. Iverson explained that the committee determined that Montana's export ban could be ruled unconstitutional, and recommended that it be repealed. He said the state's ban on the use of water for coal slurry should also be repealed, but emphasized that the repeal of the ban is expressly conditioned on maintaining all other portions of the bill.

The ban on the use of water for coal slurry, he said does not protect the state's water, and does not provide a control over coal development. Further, it violates the equal

protection clause of the constitution, he said. To leave the ban intact invites expensive litigation, which the state would almost surely lose, said Rep. Iverson.

In describing the proposed water leasing program, Rep. Iverson explained that the department of natural resources and conservation would be allowed to appropriate and act as proprietor for up to 50,000 acre feet of water annually, which water could be marketed only out of storage, and not out of stream-flow. He noted that in this situation, with the state acting as proprietor, the price is negotiable and could be discriminatory in the marketplace, offering a lower price to agriculture than to other users. The proceeds from any water leasing would go to the state general fund. Renewable leases, not to exceed 50 years, would be required for transport outside of specified water basins, or for any beneficial water use in which consumption would exceed 4000 acre feet per year and 5.5 cubic feet per second. Water for the leasing program would be obtained from specified existing federal reservoirs or other existing or future reservoirs in adjudicated basins.

Other select committee recommendations outlined by Rep. Iverson include completion of the stream adjudication process, development of a water resources data management system, appropriating additional funds for the management of water reservations, preparing a state water plan and creating a permanent legislative committee on water policy to advise the legislature.

Rep. Iverson introduced John Thorson, an attorney specializing in water policy issues, who assisted the select committee. Mr. Thorson provided an appendix outlining the sections of HB 680 (Exhibit 2) and described the provisions of the bill.

PROPOSERS: Larry Fasbender, director of the department of natural resources and conservation, spoke as a supporter of HB 680. He noted that the select committee had put a great deal of time into the complex bill, and that DNRC is confident that the bill adequately addresses the issue of water policy. He asked, however, that the committee look carefully at the portion of the bill that states DNRC shall provide financial and technical assistance to Missouri River basin water projects. He said that requirement could mean problems for the department, and that when money is lacking, the department's responsibility to provide financial assistance should be conditional upon legislative funding.

Willa Hall, of Helena, spoke on behalf of the League of Women Voters in support of the bill. She commended the select committee on water marketing for its work, and said HB 680 is a good response to the need for a state water policy. She

said the LWV supports the legislation only if all of its provisions are adopted, and that the DRNC remains the sole proprietor in water leasing programs. She also noted that the provisions of the bill that place some pipelines under the Major Facility Siting Act are very important, and must be maintained.

Jim Flynn, director of the department of Fish, Wildlife and Parks, said the bill would maximize Montana's interest in the allocation of Missouri River basin water. Water policy is critical, he said, and he urged adoption of HB 680 in its entirety. A copy of his testimony is attached hereto as Exhibit 3.

Robert Green, a farmer from the Tongue River area near Miles City, testified in support of HB 680 on behalf of the Northern Plains Resource Council. He said passage of HB 680 in its present form would enable the state to protect its water resources and provide for orderly development. The bill is neither burdensome nor restrictive upon agriculture, he said. A copy of his testimony is attached hereto as Exhibit 4.

Terry Murphy of Great Falls, testifying on behalf of the Montana Farmers' Union, said the majority of the members of that group support HB 680. He cautioned that farmers support the sale or lease of excess water only, and that profits must go toward state water policy control.

Ted Doney, an attorney specializing in water law, and former director of the department of natural resources and conservation, spoke in support of HB 680. He said he has long been opposed to Montana's ban on using water for coal slurry. He said the limited leasing program outlined in HB 680 maximizes the state's control over its water resources. HB 680 is not perfect, he said, but future legislators will have time to fine tune the legislation once it is in place.

Ken Kelly spoke in support of the bill on behalf of the Montana Water Development Association. He said the Association has supported the concept of water leasing for years. He said that if anyone fears a price will be put on water that would effectively eliminate agricultural users from the market, those fears should be allayed by the assurance that the state could discriminate on pricing, and offer a lower price to agricultural users.

Phillip Davis, an attorney from Bozeman, spoke in support of HB 680 on behalf of the Environmental Information Center. He said he is convinced that the positive aspects of the bill provide adequate safeguards for Montana's water. He said the EIC supports the bill as a complete unit, and would

closely scrutinize any proposed amendments. He specifically supported Section 10 of HB 680, which would place pipelines over 30 miles in length and seventeen inches in diameter under the Major Facility Siting Act. He presented a sheet of information concerning that provision, which is attached hereto as Exhibit 5. A copy of his testimony is attached as Exhibit 6.

Don Reed, also representing the Environmental Information Center, said that group had participated in the interim committee's deliberations, and endorses HB 680 as a package. He offered a number of comments of the issue of pipeline coverage under the siting act. A copy of his testimony is attached hereto as Exhibit 6A.

Don Skaar supported HB 680 on behalf of the 1,200 members of the Montana chapter of the Sierra Club. He said the bill would protect the state's water from out-of-state interests and uses that are not in the best interests of Montanans. He said the bill forms a cohesive policy in which the whole is stronger than the parts, and objected to any substantive amendments or deletions.

Lavina Lubinas offered support of HB 680 on behalf of Women in Farm Economics. She said WIFE recognizes that water is a commodity that should be marketed, and endorsed the methods set up under HB 680.

Scott Ross of Walleyes Unlimited said that group supports HB 680, particularly those provisions that require water reservation to ensure the instream flow needed for quality fisheries. He noted that these fisheries contribute to Montana's recreation-based tourist industry. A copy of his testimony is attached as Exhibit 7.

John Shontz, a former representative from Sidney, and member of the select committee on water marketing, said that the legislature should avoid the "little Montana attitude," and look beyond the state's borders when considering water policy questions. He noted that water leasing is not a sales program, it is a contractual arrangement that allows the state to maintain control over the price, the buyer and the future uses of its water.

No further proponents rose in support of the bill.

OPPONENTS: Bill Asher, representing the Montana Agricultural Preservation Association, the Park County Legislative Association and the MEagher County Preservation Association, rose in opposition to HB 680. He said he had been following the water policy issue for five years, and believed that the interim water committee did the best job it could, but that the result, HB 680, does not adequately

address the concerns of agricultural water users. He said he agrees with some portions of the bill, specifically those that urge adjudication of water rights through the state's water court, and the creation of a legislative water policy committee. He said that spokesmen from the groups he represented would provide further statements in opposition to the bill.

Vernon Westlake, chairman of the water committee of the Gallatin Agricultural Preservation Association, said that group opposes HB 680 with reservations. He said that repealing the ban on exportation of the state's water is premature and unnecessary. He said that changing the permit criteria for water appropriation is not in the best interests of irrigated agriculture. He said that allowing water to be used in coal slurry projects could increase the financial problems faced by railroads in Montana, and result in higher freight rates for the transportation of agricultural products. Mr. Westlake said the state should postpone any water leasing activity until the stream adjudication process now underway is completed throughout the state. He also said that water courts, and not the DNRC, should have the eventual authority to sell or lease water. A copy of his statement is attached hereto as Exhibit 8.

Bill Black of Gallatin Gateway, representing the Agricultural Preservation Association, opposed HB 680. He said that group is opposed to any sale or lease of water until the entire adjudication process is completed. He expressed particular concern about granting rule-making authority to the DNRC, and said the legislature should maintain strict control over rule-making. A copy of his statement is attached hereto as Exhibit 9.

Joe Brand of Helena spoke as a private citizen against HB 680. He said legislation on water policy should not be made until all the state's basins have been adjudicated. He also cautioned against the practice of removing water from reservations for leasing. He said that the impact of a water level change could severely damage aquatic plant and animal life. He also expressed concern that in dry years, the state's responsibility for fulfilling water leasing contract could leave Montanans without water. He said that the coal slurry ban should be left in place, so that no job loss would occur in the railroad industry.

James T. Mular, representing the Brotherhood of Railway and Airline Clerks, with about 8000 members, said any water policy legislation should be delayed until after water rights are adjudicated statewide. He spoke against the repeal of the ban on using water for coal slurry, saying that it would cause losses to the railroads, and rates "would go sky high to absorb coal haul losses." A copy of his testimony is attached as Exhibit 10.

Gary Spaeth, House District 84 representative, rose against HB 680 on his own behalf. He noted that although he was not necessarily representing his constituents, he believed that most of them would agree with his position on HB 680 if he had been able to discuss the matter with them. Rep. Spaeth said he has been very much involved in the water reservation process, and had been somewhat supportive of it in the last session. The problem with the reservation process, he said, "is that we haven't admitted we want instream flows." He said that agriculture is a "poor sister" in the reservation process, and has only been added to it to lend credibility. He questioned why the state should have water reservations if it does not have adequate water to appropriate to various needs. The reservation process, he said, "may not leave anything to protect."

Bill Rostad spoke against the bill as a representative of the Meagher County Protective Association. He said that in years of low water he wondered how the water needs of Montanans would be addressed, especially considering that state contracts required certain amounts of water to be leased.

There were no further opponents, and the floor was opened to questions from committee.

Rep. Addy asked Mr. Shontz about Mr. Brand's concern that a lease is in effect a contract, and asked if there is any protection for the state's water users in dry years. Mr. Shontz said that a contract is a negotiable document, and that the legislature has the right to define the terms of any water leasing contract. He said he was sure the department would take the "dry year" question into consideration, and that prior right appropriations would always have precedent over water leases.

Rep. Addy asked if the reservation system would set up a battle between competing interests for water, which would leave Montana at a disadvantage as compared to wealthier out-of-state interests. Mr. Shontz said the object of the reservation system is to do the exact opposite.

Rep. Raney asked if it would be possible to leave the ban on the use of water for coal slurry in the state's water policy, removing it only if it is shown to be unconstitutional. Mr. Shontz said that there is no ban on the coal slurry pipelines that use substances other than water in which to transport coal, and the ban on water use only is clearly unconstitutional. He said if the ban is left in the law and challenged, the state would be forced to go to court on the basis of an old statute. Rep. Iverson said he thought that the water ban did nothing except give the railroads a "false security."

Rep. Raney noted that several opponents of the bill asked that no action be taken until after the state's waters have been adjudicated, and wondered if it was necessary to institute a water policy now. Rep. Iverson noted that no leasing of water would take place in a basin until after adjudication was complete, but there is no reason for locking up the whole state because one basin might not yet be adjudicated.

Rep. Krueger asked for an explanation of the specified diameter for pipelines included under the Major Facility Siting Act, that is, 17 inches or more. Rep. Iverson explained that the figure was arrived at after considerable study, and would include coal slurry pipelines, but exclude gas gathering lines.

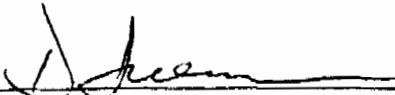
Rep. Ream asked if the specified length of pipelines covered under the Major Facility Siting Act would allow inclusion of a 48 mile line, only 20 miles of which is within the state's boundaries. Mr. Thorson said such a line would not fall under the MFSA provision, because the intent of that section is to cover only action within the state.

Rep. Driscoll asked Rep. Iverson for confirmation of the state's ability to legally discriminate on the price of water, and was told that as the proprietor, the state would have that right.

Rep. Raney asked if the bill would give too much power to DNRC, and Rep. Iverson said any extension of authority could be accompanied by a statement of intent specifically outlining and limiting that power.

Rep. Iverson closed by stating that almost every fear of HB 680 could be eliminated through a careful reading of the public interest criteria portions of the bill. He told the committee that HB 680 is a carefully written, comprehensive piece of legislation that should be approved, and must remain intact.

There being no further questions, and no further business before the committee, the hearing was ended at 10:10 p.m.



REP. DENNIS IVERSON, Chairman

DAILY ROLL CALL

HOUSE NATURAL RESOURCES

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date

2/18/85

NAME	PRESENT	ABSENT	EXCUSED
IVERSON, Dennis (Chairman)	X		
KADAS, Mike (Vice-Chairman)	X		
ADDY, Kelly	X		
ASAY, Tom	X		
COBB, John	X		
DRISCOLL, Jerry	X		
GARCIA, Rodney	X		
GRADY, Edward	X		
HARP, John	X		
JONES, Tom	X		
KRUEGER, Kurt	X		
MILES, Joan	X		
MOORE, Janet	X		
O'HARA, Jesse	X		
PETERSON, Mary Lou	X		
RANEY, Bob	X		
REAM, Bob	X		
SMITH, Clyde	X		

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The Big Sky Country

MONTANA STATE SENATE

January 1985

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

No more important natural resource issue faced the 48th Legislature, which met January 3 to April 21, 1983, than the question of marketing Montana's waters. Based upon the work and recommendations of the Select Committee on Water Marketing, whose report I am honored to transmit, Montana's policies for the management, conservation, and use of its waters will be a vital issue facing the 49th and future Legislatures as well.

The 48th Legislature was highlighted by deliberations over whether Montana should market its waters - principally for industrial uses and particularly for coal slurry. There were some who urged us into immediate action based on their prediction that, if Montana did not act swiftly to market its surplus waters, two undesirable results would occur. First, downstream states would satisfy the demand and reap the financial rewards. Worse, in doing so, they would appropriate, put to use, and remove from Montana's eventual use those waters involved.

The 48th legislature did act to suspend the constitutionally suspect ban against out-of-state exports of water (MCA § 85-1-121) and to allow limited water marketing from Fort Peck and other federal reservoirs. Its members, however, chose not to adopt a hastily conceived and insufficiently understood water marketing program. The Legislature's principal response, with the passage of House Bill 908, was to mandate a two-year study of water marketing by a Select Committee which it has been my privilege to chair.

Events have demonstrated the wisdom of this caution. Although interest in the water marketing concept continues to grow, there has not developed a regional water market. There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the ETSI coal slurry pipeline conglomerate has fallen through.

This market hiatus has benefitted the committee's work. When initially proposed to the Legislature, the water marketing concept diverted attention away from the more important issue: what should be Montana's water policy in an interstate setting?

I am pleased to report that, in nine meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from Montana and other western states. We have been aided by the cooperative efforts of the departments of Natural Resources and Conservation and Fish, Wildlife, and Parks. The committee is particularly indebted to the Lincoln Institute of Land Policy, which cosponsored two excellent legal and policy seminars on interstate water issues.

The complete final report of the committee is being conveyed to the Legislature under separate cover, and I urge any person who is deeply interested in this topic to consult this very complete document. This summary report sets forth the actions that have been approved by and are being recommended by the committee. I am pleased to report that these recommendations were unanimously approved by all members of the committee in attendance at its meeting on December 3, 1984.

Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set forth an agenda of water issues that must be systematically addressed by the Legislature and the citizens of the state in the years to come. These recommendations concern a strategy for a water policy for Montana in an interstate setting. This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing.

In behalf of all members of the Select Committee, I urge your careful consideration of this report.

Sincerely,

SENATOR JEAN TURNAGE
Chairman

OVERVIEW OF THE COMMITTEE'S RECOMMENDATIONS

The following is an overview of the major recommendations of the Select Committee on Water Marketing to the 49th Legislature.

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. Ban on the exportation of water. The statutory ban on the exportation of water from Montana (MCA § 85-1-121) should be permanently repealed; and, with appropriate safeguards, Montana's waters should be permitted to move interstate.
2. Permit criteria. Applications to appropriate large quantities of new water [4000 acre feet/year (ac-ft/yr) and 5.5 cubic feet/second (cfs)] or to change the use or location of presently appropriated water - especially when these applications contemplate the interstate movement of water - should be closely evaluated with reference to detailed public interest criteria (MCA § 85-2-311).
3. Water for coal slurry purposes. With safeguards appropriate to protect the state, its environment, and its citizens, Montana's ban on the use of water for coal slurry purposes (MCA § 85-2-104) should be repealed.
4. Coverage of pipelines under the Major Facility Siting Act. The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.).

B. STATE WATER LEASING PROGRAM

5. Limited water leasing program. The committee recommends a limited state water leasing program involving 50,000 ac-ft of impounded water. A lease, for a period not to exceed 50 years (which can be renewed), would be required to obtain water in two instances: (a) for transport, in any amount, outside of specified water basins; or (b) for any beneficial water use where consumption would exceed 4000 ac-ft/yr and

5.5 cfs. Lease applications would be reviewed under the public interest criteria of MCA § 85-2-311 (as proposed) and, in most cases, through an environmental impact statement.

6. Acquisition of water. Water for the water leasing program would be obtained from (a) specified existing federal reservoirs (i.e., Fort Peck, Canyon Ferry, Tiber, Hungry Horse, Yellowtail); or (b) other existing or future reservoirs in adjudicated basins.

7. Use of water leasing proceeds. The committee identifies numerous possible uses of proceeds from the water leasing program.

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER

"GETTING MONTANA'S HOUSE IN ORDER"

8. General stream adjudication. The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.

9. Indian and federal reserved water rights. The committee recommends support for legislation to extend the Reserved Water Rights Compact Commission for two years and the appropriation of adequate funds for the commission to complete its goals.

10. Water resources data management system. The committee recommends the establishment with the Department of Natural Resources and Conservation (DNRC) of a centralized water resources data management system making readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands.

11. Water reservation system. Additional funds should be appropriated to ensure adequate monitoring and perfection of the existing Yellowstone water reservations. Water reservations similar to those developed for the Yellowstone River Basin should be prepared for the Missouri River Basin and funds should be appropriated to provide the necessary technical and financial assistance to applicants. Any reservation application proposing out-of-state use of water should be evaluated with

reference to detailed public interest criteria. The DNRC should continue its public education program concerning the merits and procedures of the reservation process.

12. State water plan. The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

13. Water development. The committee recommends continued funding and bonding for identifying, developing, and constructing water projects within the state. The DNRC, Montana's Washington, D. C. office, and the state's Congressional delegation should work actively for the authorization and funding of federal projects within the state.

14. Water policy committee. The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing way, on water policy and issues of importance to the state.

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. Preparation for negotiations and possible litigation. Montana should systematically prepare for negotiations and potential litigation with other Missouri River Basin states.

16. Efforts toward an interstate compact. Efforts toward negotiating a compact among the Missouri River Basin states should be a high priority of Montana. While DNRC should have lead responsibility in this effort, the Legislature's water policy committee should be active in and supportive of these efforts.

D. MISCELLANEOUS PROVISIONS

17. Miscellaneous provisions. The committee makes certain miscellaneous and technical recommendations.

BACKGROUND

The history and culture of Montana are integrally linked with its waters - principally the waters of the Missouri and its tributaries. Before Europeans found their way into these quarters, the native people of the region were spiritually and practically reliant on the river. The journey of Lewis and Clark up to Three Forks and beyond opened the west. The fur trade of the 1800s resulted in a series of settlements along the river. Steamboats operated up as far as Fort Benton providing the materials and goods for the settlement in this new terrain. The major dams on the Missouri's mainstem - Canyon Ferry, Hauser, Holter, Fort Peck - have provided hydropower for the electrification and industrialization of the region as well as water for the irrigation of arid soils.

In the last several decades, the wilderness, recreational, and aesthetic importance of the river has been emphasized. Montanans are also concerned with the quality of the river - its cleanliness, as well as the visual and biological impact of human activities in its proximity.

Because of our ability to dam, divert, pollute, and even sterilize these waters, we as citizens and policymakers have a special responsibility toward our lifeblood. Our stewardship is particularly important due to our location at the headwaters: what we do here with these waters will affect downstream states and users. It was in response to this special and serious responsibility that the 48th Legislature mandated the study of water marketing by an interim Select Committee with four representatives from each of the houses of the Legislature.

The issue of water marketing became prominent during the 1983 Legislature because of the confluence of three events occurring during the six months preceding the opening of the session on January 3, 1983. The first event was the decision of the United States Supreme Court in Sporhase v. Nebraska in July 1982, that water is an article of interstate commerce and that absolute state statutory bans against the

exportation of water are unconstitutional as violations of the dormant interstate commerce clause.

The second event, which occurred on September 16, 1982, was the announcement by the State of South Dakota and Energy Transportation Systems, Inc. (ETSI), that South Dakota, after several months of secret negotiations, had agreed to sell 50,000 acre feet of water per year (ac-ft/yr), from Oahe Reservoir on the Missouri for \$1.4 billion. The water would be used as the transport medium in a coal slurry pipeline to be built from coal fields in the Powder River Basin near Gillette, Wyoming, with a terminus 1300 to 1800 miles south in Arkansas and possibly Louisiana. And, while ETSI has ultimately been cancelled, an alarm was sounded in other states at the time: "Let's get ours before we lose our chance."

The third event was the release, also on September 16, 1982, by the Montana Department of Natural Resources and Conservation (DNRC) of its Water Protection Strategy for Montana: Missouri River Basin (the "Trelease report"). In 1981, the Legislature had directed the department to develop a strategy to protect Montana's options for future instate water use in the face of expanding water use by downstream states. Completed by renowned water expert Frank J. Trelease and Wright Water Engineers, Inc., the study set forth a six-part strategy which, somewhat unfairly, has been widely summarized as suggesting a water development, "use it or lose it," strategy for the state.

By the commencement of the 1983 Legislature, these three events converged. Montana needed to protect its waters, principally on the Missouri. State control over its waters had been significantly weakened by the holding in Sporhase, and its long-term effects were uncertain. South Dakota had turned the damage done by Sporhase to state water jurisdiction into a huge, potential financial bonanza. Other states were likely to follow, with uncertain effects on the allocation of Missouri River water. Montana needed to develop its water through projects such as improvement of the Tongue River Dam, but substantial funds were needed. Therefore, the conclusion seemed logical at the

time: sell water to produce revenues to fund the water development projects necessary to save Montana's water.

During the 1983 session, three bills were ultimately introduced concerning water marketing. Rep. Ted Neuman introduced HB 893 for the Schwinden administration. Rep. Bob Marks introduced HB 894 in a measure closely paralleling the administration's bill.

Ultimately, HB 893 made it to the House floor where, during a late-night session, it was defeated. In its place the Legislature adopted HB 908, authored by Rep. Hal Harper and others. As amended and finally passed, this bill accomplished two things. First, the measure authorized a temporary water marketing program by broadening the authority of DNRC to purchase or acquire water from any federal reservoir (not just Fort Peck, as under the then-existing law) for the purposes of "sale, rent, or distribution for industrial or other purposes." The state's ban on the export of water was repealed, and detailed public interest criteria for the issuance of permits (and retaining ultimate legislative approval of certain large diversions) were placed into law. These provisions will expire on June 30, 1985, and the pre-existing law will be "revived" unless the 49th Legislature acts.

The second accomplishment of HB 908 was the creation of a Select Committee on Water Marketing to "undertake a study of economic, tax, administrative, legal, social, and environmental advantages and disadvantages of water marketing." The committee has been staffed by the Environmental Quality Council. Over the course of the two-year study, the committee has met for eight official meetings, two seminars, and three public hearings.

In developing its final recommendations, the committee considered the merits of four sets of water strategies. These strategy sets were identified as "Level 1" through "Level 4 Responses" depending on the breadth of the actions proposed. The four strategy sets, or levels of response, were as follows:

Level 1 Response - Do nothing

Level 2 Response - Undertake a "minor tune-up" of existing statutes

Level 3 Response - Develop a water marketing program

Level 4 Response - Develop a state strategy to maximize Montana's fair share of Missouri River Basin water

The committee ultimately decided that a comprehensive state water strategy (Level 4 Response) be recommended to the Legislature. The committee reached the consensus that, while they are important considerations, neither coal slurry nor water marketing are the only issues to be addressed. Rather, the fundamental concern of the 49th Legislature, as well as of many future legislature sessions, is the adequacy of state policies to maximize and reserve for present and future use Montana's fair share of the water in interstate rivers and streams - particularly the Missouri. We do not sell our heritage by marketing 50,000 ac-ft/yr of water. We do let our precious heritage slip away if we fail to adopt legally sufficient policies to protect Montana's present and future interests in the 16.68 million acre feet of water that leave the state through the Missouri and the 26 million acre feet that leave the state through the Clark Fork and Kootenai each year.

DETAILED RECOMMENDATIONS AND COMMENTARY

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. BAN ON THE EXPORTATION OF WATER

Recommendations:

The committee finds that under appropriate circumstances (and as has been the policy for the last two years) the exportation of Montana's water is not in conflict with the public welfare of its citizens or with the conservation of its waters. Thus, the committee recommends that the statutory ban on the exportation of water from Montana (MCA § 85-1-121), which is scheduled to come back into operation of law on July 1, 1985, should not be allowed to revive. The present freedom for water to move interstate, when coupled with the other recommendations of the committee, should be allowed to continue.

Commentary:

With the passage of HB 908, the 1983 Legislature temporarily suspended the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982). In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law, including the export ban.

The Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds. Also, the case of Altus v. Carr (1966) found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater and invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of its water management policies and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on

exporting, due to the Legislature's ability to approve such a diversion, the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Consequently, there is no assurance that an export petition would ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed. While it is possible that the constitutionality of the statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

Proposed language:

[See Section 24 of the bill]

2. PERMIT CRITERIA

Recommendation:

The committee recommends that the public interest considerations enacted in 1983, which govern the issuance of water permits in the state (MCA § 85-2-311), be continued. The committee suggests that these criteria be strengthened by including provisions which were recently approved by a federal court in New Mexico. The committee also suggests that, in certain instances, these public interest criteria apply to applications for a change in use of water. Under certain circumstances, the Department of Natural Resources and Conservation should undertake rulemaking to more completely implement the permit criteria.

Commentary:

In 1983, the Legislature strengthened the criteria contained in MCA § 85-2-311 governing the issuance of water permits. This modification, effective for two years, added the following major features to the criteria (commonly called "public interest criteria"). In permit applications for appropriations of 10,000 ac-ft/yr or more or 15 cfs or more:

(1) a determination that the proposed appropriation is "reasonable" based on the following considerations:

- (a) existing and future demands for water;
- (b) anticipated benefits to the applicant and state;
- (c) effects on the quantity and quality of water;
- (d) possibility of saline seep; and
- (e) probable, significant adverse environmental impacts; and

(2) for consumptive diversions in these amounts, approval of the Legislature.

These provisions are scheduled to expire on July 1, 1985; and the old version of section 85-2-311 is scheduled to revive. The committee, however, has received favorable public comment concerning the temporary provisions of MCA § 85-2-311. In general, the committee believes such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines and should be reenacted.

Additionally, however, the committee believes that several provisions drawn from New Mexico (and that have been approved by the federal district court there), if coupled with Montana's statute, could significantly protect Montana's valid interest when proposals are made to move water interstate. Specifically, proposals for the out-of-state movement of water would have to be evaluated against the following additional criteria:

- (1) whether there are water shortages in Montana;
- (2) whether water subject to the application could feasibly be transported to alleviate shortages in Montana;
- (3) the sources of water available to the applicant in the state of destination; and
- (4) the demand being placed on the applicant's sources and supply in the state of destination.

* Acting upon the recommendation of DNRC, the committee believes the water quantity necessary to trigger application of the public interest criteria should be reduced to 4000 ac-ft/yr or more and 5.5 cfs or more. This reduction would not be onerous to applicants as only 56 out of more than 8,000 permit applications since 1973 have been of this magnitude.

At present, the protective public interest criteria do not apply to change of use applications for existing water rights. Thus, existing water rights might be transferred to another use although, under the public interest criteria, water could not be appropriated for such a use. In order to ensure that the public interest criteria apply across the board, the committee recommends their application to certain change of use applications of 4,000 ac-ft/yr or more and 5.5 cfs or more.

Proposed language:

[See Sections 4 through 7 of the bill]

3. WATER FOR COAL SLURRY PURPOSES

Recommendations:

The committee recommends that Montana's ban on the use of water as a medium to transport coal in a pipeline be removed. The use of water in a coal slurry pipeline should be recognized as a beneficial use of water. This recommendation is expressly conditioned on the passage of other recommendations made by the committee to protect the state, its environment, and its citizens from the potential damage that can be caused by such pipelines.

Commentary:

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or

the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Also, MCA § 85-2-103 makes clear: "(1) the Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the states; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane, liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act or any other statewide regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act).

The Sporhase case recognizes the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...." The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. They argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The ban, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development.

Critics of the statute argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than water. Nor does the ban conserve water; water can be used for all other forms of pipelines.

Critics of the statutory ban also argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale,

contemplate the interstate movement of coal to distant markets." As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in protecting and conserving its waters can be pursued through other means having less impact on interstate commerce.

The committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The committee, however, agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute." The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (except the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.

Proposed language:

[See Section 25 of the bill]

4. COVERAGE OF PIPELINES UNDER THE MAJOR FACILITY SITING ACT

Recommendation:

The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 17 inches in diameter be covered by the provisions of the Major Facility Siting Act (MFSA). The DNRC should continuously monitor slurry technology to ascertain whether this standard provides sufficient protection to the state.

Commentary:

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction. The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSA results in a comprehensive review by the board of numerous environmental and economic considerations. At present, there is limited coverage of pipelines under the Siting Act. Under current law, if pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board. This

application is very limited however in that pipeline developers could easily tailor new coal slurry pipelines to circumvent this limited coverage.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.

The committee also feels that environmental compatibility is another reason for which to place large pipelines not running to major energy facilities under the Siting Act. Because the committee is concerned with minimizing environmental damage along the construction route, all pipelines in excess of a certain length and width should be covered.

Proposed language:

[See Sections 8 through 13 of the bill]

B. STATE WATER LEASING PROGRAM

5. LIMITED WATER LEASING PROGRAM

Recommendation:

The committee recommends establishing a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease from the state would be required to obtain water in any amount for transport outside the specified river basins or for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs is consumed. All such leases would be reviewed under the public interest criteria of MCA § 85-2-311; and an environmental impact statement would be required in most instances. Lease terms would be 50 years or less and could be renewed.

Commentary:

The details of the limited water leasing program recommended by the committee are as follows. Administered by DNRC, water would be leased from the state under two prospective circumstances:

(a) whenever water in any amount is being sought for transport out of the following river basins: the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho; the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia; the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta; the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota; the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and the Yellowstone River to its confluence with the Missouri River in North Dakota; or

(b) for uses where water in excess of 4,000 ac-ft/yr and 5.5 cfs would be consumed.

Only a total of 50,000 ac-ft/yr of water could be leased under this program for the foregoing two purposes. As water was leased, water would be appropriated in the name of the State of Montana and a certificate issued to DNRC. In the event lease applications exceeded 50,000 ac-ft/yr, DNRC would have to return to the Legislature for additional leasing authority.

The source of water for the leasing program would be impounded water from any reservoir within Montana. Water could not be leased from a reservoir in a basin for which a pending or final decree under the general stream adjudication program had not been entered. This restriction would not apply to Fort Peck, for which the state has an existing water purchase and revenue sharing agreement with the U.S. Bureau of Reclamation, and Tiber, Canyon Ferry, Hungry Horse and Yellowstone reservoirs, once memoranda of agreement have been executed. The committee strongly urges that DNRC negotiate (or renegotiate, in the case of Fort Peck) memoranda of agreement covering all federal reservoirs within the state and water purchases for all types of uses (not just industrial).

Water would be leased through bilateral negotiations. Upon receipt of an application to lease water, DNRC would evaluate the proposal with reference to the public interest criteria of MCA § 85-2-311(2) [as proposed in this report], regardless of the amount of water involved. For proposals involving less than 4,000 ac-ft/yr and less than 5.5 cfs, however, an environmental impact statement would be required only in the discretion of DNRC under its Montana Environmental Policy Act (MEPA) rules and whenever the cumulative effect of several small applications caused a significant environmental impact.

Water would be leased for terms not to exceed 50 years, although the term could be renewed. DNRC could require that 25 percent of project capacity be set aside for municipal and rural purposes (upon payment by the municipal or rural government entity of the costs of tie-in). Any other terms or conditions would be determined by DNRC through negotiations.

Proposed language:

[See Section 14 of the bill]

6. USE OF WATER LEASING PROCEEDS

Recommendation:

The committee recommends that proceeds from a water leasing program should be used to develop a sound water policy and water development program in Montana. Some possible uses of water leasing proceeds that were suggested by the committee are as follows:

- (a) all proceeds paid into the general fund;
- (b) to administer a water leasing program;

(c) to support the water courts in their adjudication of water rights;

(d) to be deposited in the water development earmarked account within the earmarked revenue fund established in MCA 17-2-102;

(e) to provide a centralized water resource data management system as described in this committee's recommendations;

(f) to provide technical and financial assistance to applicants for water reservations and to perfect existing water reservations in the Yellowstone River Basin;

(g) to repair and restore existing state-owned dams as required for safety reasons and/or to expand their beneficial use;

(h) to provide for development of water projects including off-stream storage sites that are necessary to meet existing and future water demands;

(i) to repair and restore existing municipal water supply systems;

(j) to provide installation of rural water supply systems in areas of critical need;

(k) to develop an inventory and classification of the state's groundwater resources;

(l) to provide expenses and administrative costs of a water policy committee as recommended by the Select Committee on Water Marketing;

(m) to purchase public access sites for recreational use of streams and lakes;

(n) to fund water conservation measures;

(o) to fund research on improved irrigation systems and water conservation measures especially suitable for Montana;

(p) to complete soil surveys and mapping of the state and the identification of land areas suitable for irrigation; and

(q) to further efforts to prepare for interstate litigation and negotiations.

7. ACQUISITION OF WATER FROM FEDERAL RESERVOIRS

Recommendation:

The committee recommends that the DNRC be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the Bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this agreement be renegotiated, and all future agreements be negotiated to cover water for any beneficial use.

Proposed language:

[See Section 15 of the bill.]

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER
"GETTING MONTANA'S HOUSE IN ORDER"

8. GENERAL STREAM ADJUDICATION

Recommendation:

The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee strongly urges that priority be given to prompt and accurate adjudication of the Missouri River Basin. The committee recommends that the Legislature support any justified funding request from the water courts.

Commentary:

The adjudication of pre-1973 water rights presently underway in the five water courts of the state is essential to protect future water needs in Montana. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, are predicted to be covered by preliminary decrees by the end of 1984.

Chief Water Judge W. W. Lessley has indicated that the adjudication process for the 200,000 plus claims that are now on file will be completed by 1990. To ensure the process is completed on schedule the Legislature should support the court's funding request.

9. INDIAN AND FEDERAL RESERVED WATER RIGHTS

Recommendation:

The committee recommends support for legislation that would provide a two year extension of the Reserved Water Rights Compact Commission in its efforts to negotiate federal and Indian reserved water rights. The committee recommends that adequate funds be appropriated for the Reserved Water Rights Compact Commission to accomplish its goals.

Commentary:

The committee recognizes an urgency to conclude the equitable adjudication of Indian and federal reserved water rights. Unquantified reserved water right claims hamper the ability of the state to complete the statewide adjudication of water rights, interfere with water resource planning, and limit the state's ability to prepare for interstate apportionment of the Missouri River.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the compact commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs.

10. WATER RESOURCES DATA MANAGEMENT SYSTEM

Recommendation:

The committee recommends the establishment within DNRC of a centralized water resources data management system. The system would make

readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands. The committee also recommends that \$50,000 per year for each of the next five years be allocated for the development of such a system.

Commentary:

In the 1982 Trelease study done for DNRC, the authors found that:

"In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions."

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, "the identification of existing uses and future development potential is Montana's only line of defense to obtain a fair share in any interstate allocation." Specifically, the Trelease report suggested a centralized water resources data system should have five objectives: (1) to inventory and index the location of all pertinent water resource data; (2) to assess the accuracy and completeness of existing data (remove all duplication); (3) to standardize data collection procedures; (4) to develop and implement a centralized data system that is easily accessible in a useable format to all users; and (5) to establish a continuous and integrated water resource data collection and management program. To meet this need, the Trelease report recommended the allocation of \$50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish for its Water Policy Committee, recommendation 14, to undertake verification of water resource data maintained by DNRC. The purpose of the verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

Proposed language:

[See Section 18 of the bill]

11. WATER RESERVATION SYSTEM

Recommendation:

The committee recommends an aggressive use of the water reservation system as provided in MCA § 85-2-316 to plan for and set aside water for the anticipated future needs of the state. To accomplish the reservation of waters, the committee further recommends the following:

(1) The Legislature should encourage the water reservation process by appropriating sufficient funds for technical and financial assistance to the appropriate state agencies and other political subdivisions that are authorized to reserve water.

(2) The Legislature should appropriate funds to increase the monitoring and review of existing water reservations in the Yellowstone River Basin to ensure that progress is made in perfecting these reservations.

(3) The Legislature should mandate and fund an expedited reservation process for the Missouri River Basin.

(4) Reserved waters should be exempt from the leasing program.

(5) Reservations for use of water out-of-state should be evaluated against public interest criteria based on the New Mexico statute (see Section 2).

Commentary:

Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues, such as a Congressional apportionment of the Missouri.

Montana's innovative water reservation system is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they may not be recognized as inchoate permits in an interstate apportionment action. But to the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, established reservations should be persuasive to the courts and Congress.

Reservations have been completed in the Yellowstone River Basin but the committee recognizes an urgent need to proceed with the reservation process on other major river basins. Because of downstream states' interests in the Missouri River Basin, the committee has recommended special attention be given to water reservations in this basin.

There are uncertainties regarding some water rights in the Upper Missouri River Basin but the committee urges that the planning and technical efforts required for water reservations be initiated.

The successful development of water reservations in the Missouri River Basin will require sufficient financing and technical expertise to assist state and local government entities in initiating and completing the process.

The 1982 Trelease study done for the DNRC stated:

"It is critically important that the water reserved under the Yellowstone reservation process be developed within a reasonable time frame and that the reservants adhere to the schedule stipulated by the Board of Natural Resources and Conservation in the Reservation Order. This process must be able to withstand an equitable apportionment lawsuit among the Missouri Basin states. The Montana legislature realized this and allocated funds for administrative and technical assistance to the Yellowstone conservation districts in developing their reservations. The state should continue to closely monitor the development of these reservations to assure compliance with the Board reservation order."

The committee agrees with the Trelease recommendation and urges the Legislature to provide funding for additional technical and financial assistance to assure perfection of the Yellowstone reservations.

Proposed language:

[See Sections 16 and 17 of the bill]

12. STATE WATER PLAN

Recommendation:

The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature. Also, the committee urges state officials and the state's Congressional delegation to pursue federal policies consistent with and in furtherance of the state water plan.

Commentary:

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that the DNRC formulate, and, with the approval of the Board, adopt "a comprehensive, coordinated, multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state, it is unclear whether those are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The Board has not approved any document or set of documents or component of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions.

Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of section 85-1-203 is applied, Montana does not have a state water plan.

Compliance with section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. The state is vulnerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an interstate setting if it develops a plan demonstrated as such and involving the public and the Legislature.

13. WATER DEVELOPMENT

Recommendation:

The committee recommends continued funding and bonding capacity for the identification, development, and construction of water projects within the state. The Department of Natural Resources and Conservation should prioritize potential federal projects that would qualify under the Pick-Sloan Plan and report this listing to the Legislature each biennium. In addition to monitoring developments and issues that affect the state, Montana's existing Washington, D.C. staff, in conjunction with the state's Congressional delegation, should work toward the authorization and funding of such projects.

Commentary:

Putting water to use is important for buttressing Montana's claim to its fair share of Missouri Basin water, and water development is important for putting the water to use.

While DNRC has pursued federal funding on projects such as on the Milk River, more could be done to see authorization or funding for water development projects which would qualify under the Pick-Sloan Plan. In the proposed amendments, the committee seeks to require DNRC, as a part of its biennial report to the legislature, to identify such potential projects and specify the efforts it will undertake to secure this authorization and funding. Also, the committee urges Montana's Washington, D.C. office and Congressional delegation to support these efforts.

Proposed language:

[See Section 20 of the bill]

14. WATER POLICY COMMITTEE

Recommendations:

The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing manner, on water policy and issues of importance to the state.

Commentary:

Water is a resource particularly important to the future of Montana. Policies concerning water must not be made in a vacuum. Coordinated and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the public. In exercising its role in appropriating money or approving compacts, the Legislature must understand the context of such actions and must accept them as integral parts of an overall state water strategy. Likewise, other agencies must be able to express their concerns about proposed policies and be able to express their concerns about proposed policies and be able to coordinate their own actions. Finally, the general public must understand the rationale for water policies so as to be supportive; and many citizens have valuable expertise to render in the development of water policy. These concerns argue for the creation of a permanent committee devoted to monitoring Montana's water policy.

During the next biennium, particularly important issues for discussion by such a committee could include:

- o constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Yellowstone basins;
- o oversight of the quantification of pre-1973, Indian, and federal reserved water rights;
- o the adequacy of the state's water resources data system, including the consideration of the adequacy of water research currently underway in state agencies and institutions, in meeting state policy and management needs;
- o the content of the state water plan and water development plan; and/or
- o the status of the state water reservation program.

The committee could be of particular value in developing communications with similar bodies in other Missouri Basin states.

Proposed language:

[See Section 21 of the bill]

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. PREPARATION FOR NEGOTIATIONS AND POSSIBLE LITIGATION

Recommendation:

The committee recommends that Montana prepare for negotiations and potential litigation with other Missouri River Basin states. Such preparation might include:

- (a) the establishment of a litigation contingency fund for the office of the attorney general;
- (b) the development of a clear understanding between the Attorney General's office and DNRC as to their respective responsibilities for preparing for litigation and negotiations;

(c) the development of Montana's legal, economic, and equitable arguments in support of the apportionment of Missouri River water contained in the O'Mahoney-Milliken Amendment;

(d) the requirement that DNRC and, perhaps, the Attorney General's office submit annually to the Water Policy Committee and biannually to the Legislature a detailed report concerning Montana's strategy for interbasin litigation and negotiations; this report would also review the steps being undertaken in preparation for litigation and negotiation; the departments would be authorized to submit all or part of this report in confidence to the committee and Legislature if public disclosure would jeopardize litigation or negotiation strategies;

(e) the monitoring of federal and regional activities which affect Montana's water interests (especially water project funding and coal slurry legislation);

(f) intensive modeling of the interests and anticipated water strategies of other basin states; perhaps DNRC should be requested to undertake a detailed and systematic examination of compact experiences elsewhere in the United States and Canada; such an examination would include identifying contentious issues and how they were resolved, studying negotiation strategies and pitfalls, and applying the lessons of these experiences to Montana's situation;

(g) perhaps an interagency litigation and/or negotiation task force needs to be established to expedite preparations; a liaison from the legislative water policy committee also might be desirable; and

(h) perhaps issues remaining outstanding from the execution of the Yellowstone River Compact shall be resolved.

The committee recommends that money be appropriated to support these efforts.

Commentary:

Montana needs to have a thoughtful strategy regarding its relationship with other states in the Missouri River Basin. This strategy must encompass what policies Montana wishes to work for in the basin, as well as what posture Montana will take in relation to the actions of the other basin states. This strategy requires preparation for both litigation and negotiation.

While nonjudicial conflict resolution is preferable in most instances, it is inevitable that the State of Montana will have to engage in some litigation concerning Missouri Basin water issues. The Attorney General's office and DNRC must be prepared for the inevitability of such litigation. The Trelease report recommended several measures to prepare the state: a contingency fund for litigation; further development of Montana's position based on the O'Mahoney-Milliken Amendment; monitoring federal and regional development; and, modeling other states' interests and strategies.

Even though there is growing interest in the negotiation of an interstate compact to apportion the waters of the Missouri River among the basin states, some observers believe that none of the states are ready for a compact. As for Montana, the Trelease report suggests that there is the preliminary need to resolve some of the unresolved issues

remaining from the execution of the Yellowstone River Compact among Montana, Wyoming, and North Dakota.

16. EFFORTS TOWARD CONFLICT RESOLUTION IN THE MISSOURI RIVER BASIN

Recommendation:

The committee recommends that efforts toward reducing conflict among the states of the Missouri River Basin be given high priority by Montana. One result might be an interstate compact although many issues may be resolved by less formal means. The DNRC should be the lead negotiating agent for the state, but the legislative water policy committee (proposed in recommendation 14) should meet with and engage in discussions with similar legislative groups from other basin states. Montana should host a conference or other appropriate gathering of legislators and executive branch personnel from other basin states as one means to further discussions. Also, Montana should pay its dues to the Missouri Basin States Association.

Commentary:

It is predictable that the waters of the Missouri River Basin will eventually be allocated among the ten member states in the basin. That apportionment could come about through litigation, Congressional action, or interstate compacting.

The provisions of the O'Mahoney-Milliken Amendment, which give the state preference with consumptive uses over the navigation uses downstream, would be to Montana's advantage in litigation. Yet, as the lower states develop (probably at a rate faster than Montana), they will be putting water to use for municipal and industrial purposes - uses not automatically subordinated under the O'Mahoney-Milliken Amendment. As the water is put to use, the equities shift to the lower basin; and the U.S. Supreme Court, in an equitable apportionment criteria, is reluctant to reduce existing uses. Also, lower basin states may have the political clout to modify the Amendment; and, since they benefit from water not put to use upstream, they have a political incentive not to support upstream water development.

To protect its future claims to water, Montana might, on the one hand, undertake rapid water development or, on the other hand, rely on water planning and the water reservation process. But water development, though effective in making claim to the water, is expensive; and water planning and reservations, though relatively inexpensive, are of somewhat unknown value in interstate litigation.

Through effective communication with other basin states, conflicts can be resolved. Interstate compacting, in particular, offers an appealing alternative. Once executed, a compact can provide certainty in terms of present and future water entitlements. A well-written compact negates adverse judicial action and, once ratified by Congress, places the interstate settlement in most instances beyond the subsequent reaches of Congress. Expensive water development need not be undertaken solely to establish water rights.

Yet, compacts do not solve everything. Many issues, such as Indian water rights, are typically not covered by such agreements. Also, in undertaking negotiations, states must be well prepared as to data covering the resource and their own present and future needs and expectations. Successful compacting requires a high level of commitment by each of the individual states.

So long as the state's negotiators are well prepared, Montana has little to lose and much to gain by actively pursuing a compact among the states in the basin.

D. MISCELLANEOUS PROVISIONS

17. MISCELLANEOUS PROVISIONS

Recommendation:

The committee recommends the passage of certain technical provisions in addition to the substantive provisions set forth in the foregoing.

Proposed language:

[See Sections 22-29 of the bill]

1 BILL NO. _____

2 INTRODUCED BY _____

3 BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER
6 POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE
7 ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER
8 APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A
9 LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS
10 FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER
11 THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER
12 RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A
13 WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT
14 WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF
15 WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104,
16 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202,
17 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112,
18 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316,
19 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983;
20 REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE
21 DATE AND AN APPLICABILITY DATE."

22
23 WHEREAS, the Select Committee on Water Marketing was
24 commissioned by the 1983 Legislature to undertake a study of
25 the advantages and disadvantages of water marketing; and

1 WHEREAS, the Select Committee in completing its study
2 determined that Montana needs to address broader questions
3 of water policy in order to secure Montana's interests in
4 allocation and management of state waters; and

5 WHEREAS, the Select Committee has presented a
6 comprehensive package of recommendations that must be
7 considered as a whole; and

8 WHEREAS, these recommendations serve to revise
9 Montana's water policy in order to maximize Montana's
10 authority over management of state waters and other natural
11 resources and to conserve water for existing and future
12 beneficial uses by Montanans.

13 THEREFORE, the Legislature of the State of Montana
14 finds that this legislation and other recommendations of the
15 Select Committee on Water Marketing constitute an
16 appropriate revision of state water policy necessary to
17 secure Montana's interests for present and future benefit to
18 Montanans.

19
20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

21 Section 1. Section 85-2-102, MCA, is amended to read:

22 "85-2-102. Definitions. Unless the context requires
23 otherwise, in this chapter the following definitions apply:

24 (1) "Appropriate" means to divert, impound, or
25 withdraw (including by stock for stock water) a quantity of

1 water or, in the case of a public agency, to reserve water
2 in accordance with 85-2-316.

3 (2) "Beneficial use", unless otherwise provided,
4 means:

5 (a) a use of water for the benefit of the
6 appropriator, other persons, or the public, including but
7 not limited to agricultural (including stock water),
8 domestic, fish and wildlife, industrial, irrigation, mining,
9 municipal, power, and recreational uses; and

10 (b) a use of water appropriated by the department for
11 the state water leasing program under [section 14] and of
12 water leased under a valid lease issued by the department
13 under [section 14].

14 (3) "Board" means the board of natural resources and
15 conservation provided for in 2-15-3302.

16 (4) "Certificate" means a certificate of water right
17 issued by the department.

18 (5) "Change in appropriation right" means a change in
19 the place of diversion, the place of use, the purpose of
20 use, or the place of storage.

21 ~~(5)~~(6) "Declaration" means the declaration of an
22 existing right filed with the department under section 8,
23 Chapter 452, Laws of 1973.

24 ~~(6)~~(7) "Department" means the department of natural
25 resources and conservation provided for in Title 2, chapter

1 15, part 33.

2 ~~(7)~~(8) "Existing right" means a right to the use of
3 water which would be protected under the law as it existed
4 prior to July 1, 1973.

5 ~~(8)~~(9) "Groundwater" means any water beneath the land
6 surface or beneath the bed of a stream, lake, reservoir, or
7 other body of surface water, and which is not a part of that
8 surface water.

9 ~~(9)~~(10) "Permit" means the permit to appropriate issued
10 by the department under 85-2-301 through 85-2-303 and
11 85-2-306 through 85-2-314.

12 ~~(10)~~(11) "Person" means an individual, **association**,
13 partnership, corporation, state agency, political
14 subdivision, the United States or any agency thereof, or any
15 other entity.

16 ~~(11)~~(12) "Political subdivision" means any county,
17 incorporated city or town, public corporation, or district
18 created pursuant to state law or other public body of the
19 state empowered to appropriate water but not a private
20 corporation, association, or group.

21 ~~(12)-"Slurry"-means-a-mixture-of--water--and--insoluble~~
22 ~~material-~~

23 (13) "Waste" means the unreasonable loss of water
24 through the design or negligent operation of an
25 appropriation or water distribution facility or the

1 application of water to anything but a beneficial use.

2 (14) "Water" means all water of the state, surface and
3 subsurface, regardless of its character or manner of
4 occurrence, including but not limited to geothermal water,
5 diffuse surface water, and sewage effluent.

6 (15) "Water division" means a drainage basin as defined
7 in 3-7-102.

8 (16) "Water judge" means a judge as provided for in
9 Title 3, chapter 7.

10 (17) "Water master" means a master as provided for in
11 Title 3, chapter 7.

12 (18) "Well" means any artificial opening or excavation
13 in the ground, however made, by which groundwater is sought
14 or can be obtained or through which it flows under natural
15 pressures or is artificially withdrawn."

16 Section 2. Section 85-1-204, MCA, is amended to read:

17 "85-1-204. Department powers over state waters. (1)
18 The department, with the approval of the board, may sell,
19 lease, and otherwise dispose of all waters which may be
20 impounded under this chapter, and the water may be sold for
21 the purpose of irrigation, development of power, watering of
22 stock, or any other purpose. The department may also lease
23 water under the state water leasing program established
24 under the provisions of [section 14]. To the extent that it
25 may be necessary to carry out this chapter and subject to a

1 compliance with the other provisions of this chapter, the
2 department has full control of all the water of the state
3 not under the exclusive control of the United States and not
4 vested in private ownership, and it shall take such steps as
5 may be necessary to appropriate and conserve the same for
6 the use of the people. The authority of the department
7 conferred by this chapter extends and applies to rights to
8 the natural flow of the waters of this state which it may
9 acquire, with the approval of the board, by condemnation,
10 purchase, exchange, appropriation, or agreement.

11 (2) For the purpose of regulating the diversion of
12 those waters, the department may enter upon the means and
13 place of use of all appropriators for making surveys of
14 respective rights and seasonal needs.

15 (3) The department may take into consideration the
16 decrees of the courts of this state having jurisdiction
17 which purport to adjudicate the waters of a stream or its
18 tributaries, and a fair, reasonable, and equitable
19 reconciliation shall be made between the claimants asserting
20 rights under different decrees and between decreed rights
21 and asserted rights of appropriation not adjudicated by any
22 court.

23 (4) The department, at its discretion, may hold
24 hearings relating to the rights of respective claimants
25 after first giving such notice as it considers appropriate

1 and make findings of the date and quantity of appropriation
2 and use of all claimants which the department will recognize
3 and observe in diverting the waters which it owns. The
4 department may police and distribute to the owner of the
5 recognized appropriation the waters due him upon request and
6 under terms agreed upon.

7 (5) The department, when engaged in controlling and
8 dividing the natural flow of a stream under the authority
9 granted by this chapter, is exercising a police power of the
10 state, and water commissioners appointed by any court may
11 not deprive the department of any of the waters owned or
12 administered under agreement with respective owners. The
13 owner of a prior right contending that the department is not
14 recognizing and respecting the appropriation may resort to a
15 court for the purpose of determining whether or not the
16 rights of the claimant have been invaded, and the department
17 shall observe the terms of the final decree.

18 (6) When the department impounds or acquires the right
19 of appropriation of the waters of a stream it may divert or
20 authorize the diversion at any point on the stream or any
21 portion thereof when it is done without injury to a prior
22 appropriator."

23 Section 3. Section 85-2-301, MCA, is amended to read:

24 "85-2-301. Right to appropriate. (1) After July 1,
25 1973, a person may not appropriate water except as provided

1 in this chapter. A person may only appropriate water for a
2 beneficial use.

3 (2) (a) Only the department may appropriate water by
4 permit under 85-2-311 in either of the following instances:

5 (i) for transport outside the following river basins:

6 (A) the Clark Fork River and its tributaries to its
7 confluence with Lake Pend Oreille in Idaho;

8 (B) the Kootenai River and its tributaries to its
9 confluence with Kootenay Lake in British Columbia;

10 (C) the St. Mary River and its tributaries to its
11 confluence with the Oldman River in Alberta;

12 (D) the Little Missouri River and its tributaries to
13 its confluence with Lake Sakakawea in North Dakota;

14 (E) the Missouri River and its tributaries to its
15 confluence with the Yellowstone River in North Dakota; and

16 (F) the Yellowstone River to its confluence with the
17 Missouri River in North Dakota; or

18 (ii) whenever water in excess of 4,000 acre-feet a year
19 and 5.5 cubic feet per second, for any use, is to be
20 consumed.

21 (b) Water for these purposes or in these amounts may
22 be leased from the department by any person under the
23 provisions of [section 14].

24 (3) A right to appropriate water may not be acquired
25 by any other method, including by adverse use, adverse

1 possession, prescription, or estoppel. The method prescribed
2 by this chapter is exclusive."

3 Section 4. Section 85-2-311, MCA, is amended to read:

4 "85-2-311. Criteria for issuance of permit. (1) Except
5 as provided in subsections (2) ~~and--(3)~~ through (4), the
6 department shall issue a permit if the applicant proves by
7 substantial credible evidence that the following criteria
8 are met:

9 (a) there are unappropriated waters in the source of
10 supply:

11 (i) at times when the water can be put ~~to~~ the use
12 proposed by the applicant;

13 (ii) in the amount the applicant seeks to appropriate;
14 and

15 (iii) throughout the period during which the applicant
16 seeks to appropriate, the amount requested is available;

17 (b) the water rights of a prior appropriator will not
18 be adversely affected;

19 (c) the proposed means of diversion, construction, and
20 operation of the appropriation works are adequate;

21 (d) the proposed use of water is a beneficial use;

22 (e) the proposed use will not interfere unreasonably
23 with other planned uses or developments for which a permit
24 has been issued or for which water has been reserved.

25 (2) ~~that~~ The department may not issue a permit for an

1 appropriation of ~~10,000~~ 4,000 or more acre-feet of water a
 2 year ~~or 15~~ and 5.5 or more cubic feet per second of water
 3 unless ~~it affirmatively finds~~ the applicant proves by clear
 4 and convincing evidence that:

5 ~~(i)~~ (a) the criteria in subsection (1) are met;

6 ~~(ii)~~ (b) ~~the applicant has proven by clear and~~
 7 ~~convincing evidence that~~ the rights of a prior appropriator
 8 will not be adversely affected;

9 ~~(iii)~~ (c) the proposed appropriation is a reasonable
 10 use. Such a finding shall be based on a consideration of the
 11 following:

12 ~~(A)~~ (i) the existing demands on the state water supply,
 13 as well as projected demands such as reservations of water
 14 for future beneficial purposes, including municipal water
 15 supplies, irrigation systems, and minimum streamflows for
 16 the protection of existing water rights and aquatic life;

17 ~~(B)~~ (ii) the benefits to the applicant and the state;

18 ~~(C) the economic feasibility of the project;~~

19 ~~(B)~~ (iii) the effects on the quantity, and quality, ~~and~~
 20 potability of water for existing beneficial uses in the
 21 source of supply;

22 (iv) the availability and feasibility of using
 23 low-quality water for the purpose for which application has
 24 been made;

25 ~~(E)~~ (v) the effects on private property rights by any

1 creation of or contribution to saline seep; and

2 ~~(F)~~(vi) the probable significant adverse environmental
3 impacts of the proposed use of water as determined by the
4 department pursuant to Title 75, chapter 1, or Title 75,
5 chapter 20.

6 ~~(b)--A permit for an appropriation for a diversion for~~
7 ~~a consumptive use of 10,000 or more acre-feet of water a~~
8 ~~year or 15 or more cubic feet per second of water under this~~
9 ~~subsection may not be issued unless the department petitions~~
10 ~~the legislature and the legislature affirms the findings of~~
11 ~~the department.~~ /

12 (3) (a) The state of Montana has long recognized the
13 importance of conserving its public waters and the necessity
14 to maintain adequate water supplies for the state's water
15 requirements. Although the state of Montana also recognizes
16 that, under appropriate conditions, the out-of-state
17 transportation and use of its public waters are not in
18 conflict with the public welfare of its citizens or the
19 conservation of its waters, the criteria in this subsection
20 (3) must be met before out-of-state use may occur.

21 (b) The department may not issue a permit for the
22 appropriation of water for withdrawal and transportation for
23 use outside the state unless the applicant proves by clear
24 and convincing evidence that:

25 (i) depending on the volume of water diverted or

1 consumed, the applicable criteria and procedures of
2 subsection (1) or (2) are met;

3 (ii) the proposed out-of-state use of water is not
4 contrary to water conservation in Montana; and

5 (iii) the proposed out-of-state use of water is not
6 otherwise detrimental to the public welfare of the citizens
7 of Montana.

8 (c) In determining whether the applicant has proved by
9 clear and convincing evidence that the requirements of
10 subsections (3)(b)(ii) and (3)(b)(iii) are met, the
11 department shall consider the following factors:

12 (i) whether there are present or projected water
13 shortages within the state of Montana;

14 (ii) whether the water that is the subject of the
15 application could feasibly be transported to alleviate water
16 shortages within the state of Montana;

17 (iii) the supply and sources of water available to the
18 applicant in the state where the applicant intends to use
19 the water; and

20 (iv) the demands placed on the applicant's supply in
21 the state where the applicant intends to use the water.

22 (d) When applying for a permit or a lease to withdraw
23 and transport water for use outside the state, the applicant
24 shall submit to and comply with the laws of the state of
25 Montana governing the appropriation, lease, and use of

1 water.

2 ~~(3)~~(4) An appropriation, diversion, impoundment, use,
3 restraint, or attempted appropriation, diversion,
4 impoundment, use, or restraint contrary to the provisions of
5 this section is ~~null-and-void~~ invalid. No officer, agent,
6 agency, or employee of the state may knowingly permit, aid,
7 or assist in any manner such unauthorized appropriation,
8 diversion, impoundment, use, or other restraint. No person
9 or corporation may, directly or indirectly, personally or
10 through an agent, officer, or employee, attempt to
11 appropriate, divert, impound, use, or otherwise restrain or
12 control waters within the boundaries of this state except
13 in accordance with this section."

14 Section 5. Section 85-2-312, MCA, is amended to read:

15 "85-2-312. Terms of permit. (1) The department may
16 issue a permit for less than the amount of water requested,
17 but in no case may it issue a permit for more water than is
18 requested or than can be beneficially used without waste for
19 the purpose stated in the application. The department may
20 require modification of plans and specifications for the
21 appropriation or related diversion or construction. ~~It~~ Based
22 upon the criteria listed in 85-2-311, the department may
23 issue a permit subject to terms, conditions, restrictions,
24 and limitations it considers necessary ~~to-protect-the-rights~~
25 ~~of-other--appropriators~~, and it may issue temporary or

1 seasonal permits. A permit shall be issued subject to
2 existing rights and any final determination of those rights
3 made under this chapter.

4 (2) The department may limit the time for commencement
5 of the appropriation works, completion of construction, and
6 actual application of the water to the proposed beneficial
7 use. In fixing those time limits, the department shall
8 consider the cost and magnitude of the project, the
9 engineering and physical features to be encountered, and, on
10 projects designed for gradual development and gradually
11 increased use of water, the time reasonably necessary for
12 that gradual development and increased use. For good cause
13 shown by the permittee, the department may in its discretion
14 reasonably extend time limits.

15 (3) The original of the permit shall be sent to the
16 permittee, and a copy shall be kept in the office of the
17 department in Helena.

18 (4) The department shall provide to the county clerk
19 and recorder of the county wherein the point of diversion or
20 place of use is located quarterly reports and an annual
21 summary report of all water right permits, certificates, and
22 change approvals issued by the department within the
23 county."

24 Section 6. Section 85-2-124, MCA, is amended to read:

25 "85-2-124. Fees for environmental impact statements.

1 (1) Whenever the department determines that the filing of an
2 application (or a combination of applications) for a permit
3 or approval under this chapter requires the preparation of
4 an environmental impact statement as prescribed by the
5 Montana Environmental Policy Act and the application (or
6 combination of applications) involves the use of ~~10,000~~
7 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic
8 feet per second of water, the applicant shall pay to the
9 department the fee prescribed in this section. The
10 department shall notify the applicant in writing within 90
11 days of receipt of a correct and complete application (or a
12 combination of applications) if it ~~determines that~~ an
13 environmental impact statement and fee is required.

14 (2) Upon notification by the department under
15 subsection (1), the applicant shall pay a fee based upon the
16 estimated cost of constructing, repairing, or changing the
17 appropriation and diversion facilities as herein provided.
18 The maximum fee that shall be paid to the department may not
19 exceed the fees set forth in the following declining scale:
20 2% of the estimated cost up to \$1 million; plus 1% of the
21 estimated cost over \$1 million and up to \$20 million; plus
22 1/2 of 1% of the estimated cost over \$20 million and up to
23 \$100 million; plus 1/4 of 1% of the estimated cost over \$100
24 million and up to \$300 million; plus 1/8 of 1% of the
25 estimated cost over \$300 million. The fee shall be

1 deposited in the state special revenue fund to be used by
2 the department only to comply with the Montana Environmental
3 Policy Act in connection with the application(s). Any
4 amounts paid by the applicant but not actually expended by
5 the department shall be refunded to the applicant.

6 (3) The department and the applicant may determine by
7 agreement the estimated cost of any facility for purposes of
8 computing the amount of the fee to be paid to the department
9 by the applicant. The department may contract with an
10 applicant for:

11 (a) the development of information by the applicant or
12 a third party on behalf of the department and the applicant
13 concerning the environmental impact of any proposed activity
14 under an application;

15 (b) the division of responsibility between the
16 department and an applicant for supervision over, control
17 of, and payment for the development of information by the
18 applicant or a third party on behalf of the department and
19 the applicant under any such contract or contracts;

20 (c) the use or nonuse of a fee or any part thereof
21 paid to the department by an applicant.

22 (4) Any payments made to the department or any third
23 party by an applicant under any such contract or contracts
24 shall be credited against any fee the applicant must pay
25 hereunder. The department and the applicant may agree on

1 additional credits against the fee for environmental work
2 performed by the applicant at the applicant's own expense.

3 (5) No fee as prescribed by this section may be
4 assessed against an applicant for a permit or approval if
5 the applicant has also filed an application for a
6 certificate of environmental compatibility or public need
7 pursuant to the Montana Major Facility Siting Act and the
8 appropriation or use of water involved in the application(s)
9 for permit or approval has been or will be studied by the
10 department pursuant to that act.

11 (6) This section shall apply to all applications,
12 pending or hereinafter filed, for which the department has
13 not, as of April 9, 1975, commenced writing an environmental
14 impact statement. This section shall not apply to any
15 application, the fee for which would not exceed \$2,500.

16 (7) Failure to submit the fee as required by this
17 section shall void the application(s).

18 (8) The department may in its discretion rely upon the
19 environmental studies, investigations, reports, and
20 assessments made by any other state agency or any person,
21 including any applicant, in the preparation of its
22 environmental impact statement."

23 Section 7. Section 85-2-402, MCA, is amended to read:

24 "85-2-402. Changes in appropriation rights. ~~{1}-An~~
25 ~~appropriator may not change the place of diversion, place of~~

1 use, purpose of use, or place of storage except as permitted
2 under this section and approved by the department.

3 (2) The department shall approve the proposed change
4 if it determines that the proposed change will not adversely
5 affect the rights of other persons. If the department
6 determines that the proposed change might adversely affect
7 the rights of other persons, notice of the proposed change
8 shall be given in accordance with 85-2-307. If the
9 department determines that an objection filed by a person
10 whose rights may be affected states a valid objection to the
11 proposed change, the department shall hold a hearing thereon
12 prior to its approval or denial of the proposed change.
13 Objections shall meet the requirements of 85-2-308(2), and
14 hearings shall be held in accordance with 85-2-309.

15 (3) An appropriator of more than 15 cubic feet per
16 second may not change the purpose of use of an appropriation
17 right from an agricultural or irrigation use to an
18 industrial use.

19 (4) The department may approve a change subject to
20 such terms, conditions, restrictions, and limitations it
21 considers necessary to protect the rights of other
22 appropriators, including limitations on the time for
23 completion of the change.

24 (5) If a change is not completed as approved by the
25 department or if the terms, conditions, restrictions, and

1 limitations-of-the-change-approval-are--not--complied--with,
 2 the---department---may---after---notice---and---opportunity---for
 3 hearing---require-the-appropriator---to---show---cause---why---the
 4 change---approval---should---not-be-modified-or-revoked---if-the
 5 appropriator-fails-to-show-sufficient-cause---the---department
 6 may-modify-or-revoke-the-change-approval.

7 (6)---Without---obtaining---prior---approval---from---the
 8 department---an-appropriator-may-not-sever-all-or-any-part-of
 9 an-appropriation---right---from---the---land---to---which---it---is
 10 appurtenant---sell-the-appropriation-right-for-other-purposes
 11 or---to---other---lands---or---make---the---appropriation---right
 12 appurtenant-to-other-lands---The-department-shall-approve-the
 13 proposed-change-if-it-determines-that---the---proposed---change
 14 will-not-adversely-affect-the-water-rights-of-other-persons.
 15 If---the-department-determines-that-the-proposed-change-might
 16 adversely-affect-the-water-rights-of-other---persons---notice
 17 of---the---proposed---change---must---be-given-in-accordance-with
 18 85-2-307---if---the---department---then---determines---that---an
 19 objection---filed---by---a---person---whose---water---rights-may-be
 20 affected-states-a-valid-objection-to---the---proposed---change,
 21 the---department---shall---hold---a-hearing-thereon-prior-to-its
 22 approval-or-denial-of-the-proposed-change---Objections---must
 23 meet-the-requirements-of-85-2-308---and-hearings-must-be-held
 24 in--accordance--with-85-2-309: (1) An appropriator may not
 25 make a change in an appropriation right except as permitted

1 under this section and with the approval of the department
2 or, if applicable, of the legislature.

3 (2) Except as provided in subsections (3) through (5),
4 the department shall approve a change in appropriation right
5 if the appropriator proves by substantial credible evidence
6 that the following criteria are met:

7 (a) The proposed use will not adversely affect the
8 water rights of other persons or other planned uses or
9 developments for which a permit has been issued or for which
10 water has been reserved.

11 (b) The proposed means of diversion, construction, and
12 operation of the appropriation works are adequate.

13 (c) The proposed use of water is a beneficial use.

14 (3) The department may not approve a change in purpose
15 of use or place of use of an appropriation of 4,000 or more
16 acre-feet of water a year and 5.5 or more cubic feet per
17 second of water unless the appropriator proves by clear and
18 convincing evidence that:

19 (a) the criteria in subsection (2) are met;

20 (b) the proposed change is a reasonable use. A
21 finding of reasonable use must be based on a consideration
22 of:

23 (i) the existing demands on the state water supply, as
24 well as projected demands of water for future beneficial
25 purposes, including municipal water supplies, irrigation

systems, and minimum streamflows for the protection of
existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water
for existing uses in the source of supply;

(iv) the availability and feasibility of using
low-quality water for the purpose for which application has
been made;

(v) the effects on private property rights by any
creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental
impacts of the proposed use of water as determined by the
department pursuant to Title 75, chapter 1, or Title 75,
chapter 20.

(4) The department may not approve a change in purpose
of use or place of use for a diversion that results in 4,000
or more acre-feet of water a year and 5.5 or more cubic feet
per second of water being consumed unless:

(a) the applicant proves by clear and convincing
evidence and the department finds that the criteria in
subsections (2) and (3) are met; and

(b) the department then petitions the legislature and
the legislature affirms the decision of the department after
a public hearing.

(5) (a) The state of Montana has long recognized the

1 importance of conserving its public waters and the necessity
2 to maintain adequate water supplies for the state's water
3 requirements. Although the state of Montana also recognizes
4 that, under appropriate conditions, the out-of-state
5 transportation and use of its public waters are not in
6 conflict with the public welfare of its citizens or the
7 conservation of its waters, the following criteria must be
8 met before out-of-state use may occur:

9 (b) The department and, if applicable, the legislature
10 may not approve a change in appropriation right for the
11 withdrawal and transportation of appropriated water for use
12 outside the state unless the appropriator proves by clear
13 and convincing evidence and, if applicable, the legislature
14 approves after a public hearing that:

15 (i) depending on the volume of water diverted or
16 consumed, the applicable criteria and procedures of
17 subsection (2) or (3) are met;

18 (ii) the proposed out-of-state use of water is not
19 contrary to water conservation in Montana; and

20 (iii) the proposed out-of-state use of water is not
21 otherwise detrimental to the public welfare of the citizens
22 of Montana.

23 (c) In determining whether the appropriator has proved
24 by clear and convincing evidence that the requirements of
25 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the

1 department and, if applicable, the legislature shall
2 consider the following factors:

3 (i) whether there are present or projected water
4 shortages within the state of Montana;

5 (ii) whether the water that is the subject of the
6 proposed change in appropriation might feasibly be
7 transported to alleviate water shortages within the state of
8 Montana;

9 (iii) the supply and sources of water available to the
10 applicant in the state where the applicant intends to use
11 the water; and

12 (iv) the demands placed on the applicant's supply in
13 the state where the applicant intends to use the water.

14 (d) When applying for a change in appropriation right
15 to withdraw and transport water for use outside the state,
16 the applicant shall submit to and comply with the laws of
17 the state of Montana governing the appropriation and use of
18 water.

19 (6) For any application for a change in appropriation
20 right involving 4,000 or more acre-feet of water a year and
21 5.5 or more cubic feet per second of water, the department
22 shall give notice of the proposed change in accordance with
23 85-2-307 and shall hold a hearing in accordance with
24 85-2-309 prior to its approval or denial of the proposed
25 change. The department shall provide notice and may hold a

1 hearing upon any other proposed change if it determines that
2 such a change might adversely affect the rights of other
3 persons.

4 (7) The department or the legislature, if applicable,
5 may approve a change subject to such terms, conditions,
6 restrictions, and limitations as it considers necessary to
7 protect the rights of other persons and satisfy the criteria
8 of this section, including limitations on the time for
9 completion of the change.

10 (8) If a change is not completed as approved by the
11 department or legislature or if the terms, conditions,
12 restrictions, and limitations of the change approval are not
13 complied with, the department may, after notice and
14 opportunity for hearing, require the appropriator to show
15 cause why the change approval should not be modified or
16 revoked. If the appropriator fails to show sufficient
17 cause, the department may modify or revoke the change
18 approval.

19 (7)(9) The original of a change approval issued by the
20 department must be sent to the applicant, and a duplicate
21 must be kept in the office of the department in Helena.

22 (8)(10) A person holding an issued permit or change
23 approval that has not been perfected may change the place of
24 diversion, place of use, purpose of use, or place of storage
25 by filing an application for change pursuant to this

1 section.

2 (11) A change in appropriation right contrary to the
3 provisions of this section is invalid. No officer, agent,
4 agency, or employee of the state may knowingly permit, aid,
5 or assist in any manner such unauthorized change in
6 appropriation right. No person or corporation may, directly
7 or indirectly, personally or through an agent, officer, or
8 employee, attempt to change an appropriation right except in
9 accordance with this section."

10 Section 8. Section 75-20-104, MCA, is amended to read:

11 "75-20-104. Definitions. In this chapter, unless the
12 context requires otherwise, the following definitions apply:

13 (1) "Addition thereto" means the installation of new
14 machinery and equipment which would significantly change the
15 conditions under which the facility is operated.

16 (2) "Application" means an application for a
17 certificate submitted in accordance with this chapter and
18 the rules adopted hereunder.

19 (3) "Associated facilities" includes but is not
20 limited to transportation links of any kind, aqueducts,
21 diversion dams, transmission substations, storage ponds,
22 reservoirs, and any other device or equipment associated
23 with the production or delivery of the energy form or
24 product produced by a facility, except that the term does
25 not include a facility.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

1 (d) the relocation or upgrading of an existing
2 facility defined by (b) or (c) of subsection (10), including
3 upgrading to a design capacity covered by subsection
4 (10)(b), except that the term does not include normal
5 maintenance or repair of an existing facility.

6 (8) "Department" means the department of natural
7 resources and conservation provided for in Title 2, chapter
8 15, part 33.

9 (9) "Department of health" means the department of
10 health and environmental sciences provided for in Title 2,
11 chapter 15, part 21.

12 (10) "Facility" means:

13 (a) except for crude oil and natural gas refineries,
14 and facilities and associated facilities designed for or
15 capable of producing, gathering, processing, transmitting,
16 transporting, or distributing crude oil or natural gas, and
17 those facilities subject to The Montana Strip and
18 Underground Mine Reclamation Act, each plant, unit, or other
19 facility and associated facilities designed for or capable
20 of:

21 (i) generating 50 megawatts of electricity or more or
22 any addition thereto (except pollution control facilities
23 approved by the department of health and environmental
24 sciences added to an existing plant) having an estimated
25 cost in excess of \$10 million;

1 (ii) producing 25 million cubic feet or more of gas
2 derived from coal per day or any addition thereto having an
3 estimated cost in excess of \$10 million;

4 (iii) producing 25,000 barrels of liquid hydrocarbon
5 products per day or more or any addition thereto having an
6 estimated cost in excess of \$10 million;

7 (iv) enriching uranium minerals or any addition thereto
8 having an estimated cost in excess of \$10 million; or

9 (v) utilizing or converting 500,000 tons of coal per
10 year or more or any addition thereto having an estimated
11 cost in excess of \$10 million;

12 (b) each electric transmission line and associated
13 facilities of a design capacity of more than 69 kilovolts,
14 except that the term does not include an electric
15 transmission line and associated facilities of a design
16 capacity of 230 kilovolts or less and 10 miles or less in
17 length;

18 (c) each pipeline and associated facilities designed
19 for or capable of transporting gas (except for natural gas),
20 water, or liquid hydrocarbon products from or to a facility
21 located within or without this state of the size indicated
22 in subsection (10)(a) of this section;

23 (d) each pipeline greater than 17 inches in diameter
24 and 30 miles in length, and associated facilities;

25 ~~(d)~~(e) any use of geothermal resources, including the

1 use of underground space in existence or to be created, for
2 the creation, use, or conversion of energy, designed for or
3 capable of producing geothermally derived power equivalent
4 to 25 million Btu per hour or more or any addition thereto
5 having an estimated cost in excess of \$750,000;

6 ~~(e)~~(f) any underground in situ gasification of coal.

7 (11) "Person" means any individual, group, firm,
8 partnership, corporation, cooperative, association,
9 government subdivision, government agency, local government,
10 or other organization or entity.

11 (12) "Transmission substation" means any structure,
12 device, or equipment assemblage, commonly located and
13 designed for voltage regulation, circuit protection, or
14 switching necessary for the construction or operation of a
15 proposed transmission line.

16 (13) "Utility" means any person engaged in any aspect
17 of the production, storage, sale, delivery, or furnishing of
18 heat, electricity, gas, hydrocarbon products, or energy in
19 any form for ultimate public use."

20 Section 9. Section 75-20-216, MCA, is amended to read:

21 "75-20-216. Study, evaluation, and report on proposed
22 facility -- assistance by other agencies. (1) After receipt
23 of an application, the department and department of health
24 shall within 90 days notify the applicant in writing that:

25 (a) the application is in compliance and is accepted

1 as complete; or

2 (b) the application is not in compliance and list the
3 deficiencies therein; and upon correction of these
4 deficiencies and resubmission by the applicant, the
5 department and department of health shall within 30 days
6 notify the applicant in writing that the application is in
7 compliance and is accepted as complete.

8 (2) Upon receipt of an application complying with
9 75-20-211 through 75-20-215, and this section, the
10 department shall commence an intensive study and evaluation
11 of the proposed facility and its effects, considering all
12 applicable criteria listed in 75-20-301 and 75-20-503 and
13 the department of health shall commence a study to enable it
14 or the board of health to issue a decision, opinion, order,
15 certification, or permit as provided in subsection (3). The
16 department and department of health shall use, to the extent
17 they consider applicable, valid and useful existing studies
18 and reports submitted by the applicant or compiled by a
19 state or federal agency.

20 (3) The department of health shall within 1 year
21 following the date of acceptance of an application and the
22 board of health or department of health, if applicable,
23 within an additional 6 months issue any decision, opinion,
24 order, certification, or permit required under the laws
25 administered by the department of health or the board of

1 health and this chapter. The department of health and the
2 board of health shall determine compliance with all
3 standards, permit requirements, and implementation plans
4 under their jurisdiction for the primary and reasonable
5 alternate locations in their decision, opinion, order,
6 certification, or permit. The decision, opinion, order,
7 certification, or permit, with or without conditions, is
8 conclusive on all matters that the department of health and
9 board of health administer, and any of the criteria
10 specified in subsections (2) through (7) of 75-20-503 that
11 are a part of the determinations made under the laws
12 administered by the department of health and the board of
13 health. Although the decision, opinion, order,
14 certification, or permit issued under this subsection is
15 conclusive, the board retains authority to make the
16 determination required under 75-20-301(2)(c). The decision,
17 opinion, order, certification, or permit of the department
18 of health or the board of health satisfies the review
19 requirements by those agencies and shall be acceptable in
20 lieu of an environmental impact statement under the Montana
21 Environmental Policy Act. A copy of the decision, opinion,
22 order, certification, or permit shall be served upon the
23 department and the board and shall be utilized as part of
24 their final site selection process. Prior to the issuance of
25 a preliminary decision by the department of health and

1 pursuant to rules adopted by the board of health, the
2 department of health shall provide an opportunity for public
3 review and comment.

4 (4) Within 22 months following acceptance of an
5 application for a facility as defined in (a) and ~~(d)~~(e) of
6 75-20-104(10) and for a facility as defined in (b) ~~and-(e)~~
7 through (d) of 75-20-104(10) which is more than 30 miles in
8 length and within 1 year for a facility as defined in (b)
9 ~~and-(e)~~ through (d) of 75-20-104(10) which is 30 miles or
10 less in length, the department shall make a report to the
11 board which shall contain the department's studies,
12 evaluations, recommendations, other pertinent documents
13 resulting from its study and evaluation, and an
14 environmental impact statement or analysis prepared pursuant
15 to the Montana Environmental Policy Act, if any. If the
16 application is for a combination of two or more facilities,
17 the department shall make its report to the board within the
18 greater of the lengths of time provided for in this
19 subsection for either of the facilities.

20 (5) The departments of highways; commerce; fish,
21 wildlife, and parks; state lands; revenue; and public
22 service regulation shall report to the department
23 information relating to the impact of the proposed site on
24 each department's area of expertise. The report may include
25 opinions as to the advisability of granting, denying, or

1 modifying the certificate. The department shall allocate
2 funds obtained from filing fees to the departments making
3 reports to reimburse them for the costs of compiling
4 information and issuing the required report."

5 Section 10. Section 75-20-218, MCA, is amended to
6 read:

7 "75-20-218. Hearing date -- location -- department to
8 act as staff -- hearings to be held jointly. (1) Upon
9 receipt of the department's report submitted under
10 75-20-216, the board shall set a date for a hearing to begin
11 not more than 120 days after the receipt. ~~Except--for--those~~
12 ~~hearings--involving-applications-submitted-for-facilities-as~~
13 ~~defined-in--(b)--and--(c)--of--75-20-104(10);--certification~~
14 Certification hearings shall be conducted by the board in
15 the county seat of Lewis and Clark County or the county in
16 which the facility or the greater portion thereof is to be
17 located.

18 (2) Except as provided in 75-20-221(2), the department
19 shall act as the staff for the board throughout the
20 decisionmaking process and the board may request the
21 department to present testimony or cross-examine witnesses
22 as the board considers necessary and appropriate.

23 (3) At the request of the applicant, the department of
24 health and the board of health shall hold any required
25 permit hearings required under laws administered by those

1 agencies in conjunction with the board certification
2 hearing. In such a conjunctive hearing the time periods
3 established for reviewing an application and for issuing a
4 decision on certification of a proposed facility under this
5 chapter supersede the time periods specified in other laws
6 administered by the department of health and the board of
7 health."

8 Section 11. Section 75-20-303, MCA, is amended to
9 read:

10 "75-20-303. Opinion issued with decision -- contents.

11 (1) In rendering a decision on an application for a
12 certificate, the board shall issue an opinion stating its
13 reasons for the action taken.

14 (2) If the board has found that any regional or local
15 law or regulation which would be otherwise applicable is
16 unreasonably restrictive pursuant to 75-20-301(2)(f), it
17 shall state in its opinion the reasons therefor.

18 (3) Any certificate issued by the board shall include
19 the following:

20 (a) an environmental evaluation statement related to
21 the facility being certified. The statement shall include
22 but not be limited to analysis of the following information:

23 (i) the environmental impact of the proposed facility;

24 (ii) any adverse environmental effects which cannot be
25 avoided by issuance of the certificate;

1 (iii) problems and objections raised by other federal
2 and state agencies and interested groups;

3 (iv) alternatives to the proposed facility;

4 (v) a plan for monitoring environmental effects of the
5 proposed facility; and

6 (vi) a time limit as provided in subsection (4), during
7 which construction of the facility must be completed;

8 (b) a statement signed by the applicant showing
9 agreement to comply with the requirements of this chapter
10 and the conditions of the certificate.

11 (4) The board shall issue as part of the certificate
12 the following time limits during which construction of a
13 facility must be completed:

14 (a) For a facility as defined in (b), or (c), or (d)
15 of 75-20-104(10) that is more than 30 miles in length, the
16 time limit is 10 years.

17 (b) For a facility as defined in (b), or (c), or (d)
18 of 75-20-104(10) that is 30 miles or less in length, the
19 time limit is 5 years.

20 (c) The time limit shall be extended for periods of 2
21 years each upon a showing by the applicant to the board that
22 a good faith effort is being undertaken to complete
23 construction. Under this subsection, a good faith effort to
24 complete construction includes the process of acquiring any
25 necessary state or federal permit or certificate for the

1 facility and the process of judicial review of any such
2 permit or certificate.

3 (5) The provisions of subsection (4) apply to any
4 facility for which a certificate has not been issued or for
5 which construction is yet to be commenced."

6 Section 12. Section 75-20-304, MCA, is amended to
7 read:

8 "75-20-304. Waiver of provisions of certification
9 proceedings. (1) The board may waive compliance with any of
10 the provisions of 75-20-216 through 75-20-222, 75-20-501,
11 and this part if the applicant makes a clear and convincing
12 showing to the board at a public hearing that an immediate,
13 urgent need for a facility exists and that the applicant did
14 not have knowledge that the need for the facility existed
15 sufficiently in advance to fully comply with the provisions
16 of 75-20-216 through 75-20-222, 75-20-501, and this part.

17 (2) The board may waive compliance with any of the
18 provisions of this chapter upon receipt of notice by a
19 utility or person subject to this chapter that a facility or
20 associated facility has been damaged or destroyed as a
21 result of fire, flood, or other natural disaster or as the
22 result of insurrection, war, or other civil disorder and
23 there exists an immediate need for construction of a new
24 facility or associated facility or the relocation of a
25 previously existing facility or associated facility in order

1 to promote the public welfare.

2 (3) The board shall waive compliance with the
3 requirements of subsections (2)(c), (3)(b), and (3)(c) of
4 75-20-301 and 75-20-501(5) and the requirements of
5 subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3),
6 and 75-20-303(3)(a)(iv) relating to consideration of
7 alternative sites if the applicant makes a clear and
8 convincing showing to the board at a public hearing that:

9 (a) a proposed facility will be constructed in a
10 county where a single employer within the county has
11 permanently curtailed or ceased operations causing a loss of
12 250 or more permanent jobs within 2 years at the employer's
13 operations within the preceding 10-year period;

14 (b) the county and municipal governing bodies in whose
15 jurisdiction the facility is proposed to be located support
16 by resolution such a waiver;

17 (c) the proposed facility will be constructed within a
18 15-mile radius of the operations that have ceased or been
19 curtailed; and

20 (d) the proposed facility will have a beneficial
21 effect on the economy of the county in which the facility is
22 proposed to be located.

23 (4) The waiver provided for in subsection (3) applies
24 only to permanent job losses by a single employer. The
25 waiver provided for in subsection (3) does not apply to jobs

1 of a temporary or seasonal nature, including but not limited
2 to construction jobs, or job losses during labor disputes.

3 (5) The waiver provided for in subsection (3) does not
4 apply to consideration of alternatives or minimum adverse
5 environmental impact for a facility defined in subsections
6 (10)(b), (c), (d), (e), or ~~(e)~~ (f) of 75-20-104, for an
7 associated facility defined in subsection (3) of 75-20-104,
8 or for any portion of or process in a facility defined in
9 subsection (10)(a) of 75-20-104 to the extent that the
10 process or portion of the facility is not subject to a
11 permit issued by the department of health or board of
12 health.

13 (6) The applicant shall pay all expenses required to
14 process and conduct a hearing on a waiver request under
15 subsection (3). However, any payments made under this
16 subsection shall be credited toward the fee paid under
17 75-20-215 to the extent the data or evidence presented at
18 the hearing or the decision of the board under subsection
19 (3) can be used in making a certification decision under
20 this chapter.

21 (7) The board may grant only one waiver under
22 subsections (3) and (4) for each permanent loss of jobs as
23 defined in subsection (3)(a)."

24 Section 13. Section 75-20-1202, MCA, is amended to
25 read:

"75-20-1202. Definitions. As used in this part and 75-20-201 through 75-20-203, the following definitions apply:

(1) (a) "Nuclear facility" means each plant, unit, or other facility designed for or capable of:

(i) generating 50 megawatts of electricity or more by means of nuclear fission;

(ii) converting, enriching, fabricating, or reprocessing uranium minerals or nuclear fuels; or

(iii) storing or disposing of radioactive wastes or materials from a nuclear facility.

(b) "Nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility", as defined in 75-20-104~~(7)~~(10), is further defined to include any nuclear facility as defined in subsection (1)(a) of this section."

NEW SECTION. Section 14. Water leasing program. (1) There is a water leasing program administered by the department on behalf of the state of Montana.

(2) The department may acquire rights to water needed for leasing under this program through appropriation of water in its own name or by agreement with or purchase from another holder of water rights.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck Reservoir, if an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state is in effect;

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail Reservoirs if and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenues with the state from one or more of these reservoirs; and

(d) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered; and

(ii) for which and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state.

(4) Water may be leased for any beneficial use. The amount of water that can be leased under this program for

1 all beneficial uses shall not exceed 50,000 acre-feet.

2 (5) The term of any lease may not exceed 50 years. A
3 term may be extended up to another 50 years if the
4 department again determines the desirability of leasing by
5 applying the considerations set forth in subsection (7). In
6 making such a redetermination, the department may require
7 the completion of an environmental impact statement in
8 accordance with subsection (6).

9 (6) The department shall require the completion of an
10 environmental impact statement under the provisions of Title
11 75, chapter 1, for lease applications that would result in
12 the consumption of 4,000 acre-feet a year or more and 5.5
13 cubic feet per second or more of water and for any other
14 application for which an environmental impact statement is
15 required by law. The department shall require the
16 completion of an environmental impact statement whenever the
17 cumulative effect of more than one application for a lease
18 would constitute a probable significant environmental
19 impact.

20 (7) Upon application by any person to lease water, the
21 department shall make an initial determination of whether it
22 is desirable for the department to lease water to the
23 applicant. Such a determination of desirability shall be
24 made solely on the following considerations:

25 (a) the content of the environmental impact statement,

1 if required;

2 (b) whether there is sufficient water available under
3 the water leasing program; and

4 (c) whether the criteria, except as to legislative
5 approval, set forth in 85-2-311 have been satisfied.

6 (8) The department shall for any agreement require
7 commercially reasonable terms and conditions, which may
8 include the requirement that up to 25% of the water to be
9 leased be made available to a potential user for any
10 beneficial use upon payment by such user of the costs of
11 tapping into and removing water from the applicant's
12 project. The department may differentiate in pricing,
13 depending on the proposed beneficial use of the water.

14 (9) The lease of water or the use of water under a
15 lease does not constitute a permit as provided in 85-2-102
16 and does not establish a right to appropriate water within
17 the meaning of Title 85, chapter 2, part 3.

18 (10) For purposes of the water leasing program
19 established in this section, it is the intent of the
20 legislature that the state act as a proprietor.

21 Section 15. Section 85-1-205, MCA, is amended to read:

22 "85-1-205. Acquisition of water in federal reservoirs.
23 {†} The department may acquire water or water storage by
24 purchase option or agreement with the federal government
25 from any federal reservoir for the purpose of sale, rent, or

1 distribution for ~~industrial-and-other--uses~~ any beneficial
 2 use. In such cases, the department is not required to
 3 construct any diversion or appropriation facilities or
 4 works, and it may sell, rent, or distribute such water at
 5 such rates and under such terms and conditions as it
 6 considers appropriate, ~~except-as-provided-in-subsection-(2).~~

7 ~~(2)--Until--a--final-decree-has-been-issued-pursuant-to~~
 8 ~~85-2-234-concerning-the-waters-in-a-federal--reservoir,--the~~
 9 ~~department--may--sell,--rent,--or-distribute-such-water-only~~
 10 ~~after-a-permit-has-been-issued-to-an-applicant-for-purchase,~~
 11 ~~rent,--or-distribution-of-water-in-accordance-with-part-3--of~~
 12 ~~this-chapter."~~

13 Section 16. Section 85-2-316, MCA, is amended to read:

14 "85-2-316. Reservation of waters. (1) The state or any
 15 political subdivision or agency thereof or the United States
 16 or any agency thereof may apply to the board to reserve
 17 waters for existing or future beneficial uses or to maintain
 18 a minimum flow, level, or quality of water throughout the
 19 year or at such periods or for such length of time as the
 20 board designates.

21 (2) Water may be reserved only for existing or future
 22 beneficial uses in the following river basins:

23 (a) the Clark Fork River and its tributaries to its
 24 confluence with Lake Pend Oreille in Idaho;

25 (b) the Kootenai River and its tributaries to its

1 confluence with Kootenay Lake in British Columbia;

2 (c) the St. Mary River and its tributaries to its
3 confluence with the Oldman River in Alberta;

4 (d) the Little Missouri River and its tributaries to
5 its confluence with Lake Sakakawea in North Dakota;

6 (e) the Missouri River and its tributaries to its
7 confluence with the Yellowstone River in North Dakota; and

8 (f) the Yellowstone River to its confluence with the
9 Missouri River in North Dakota.

10 ~~(2)~~(3) Upon receiving an application, the department
11 shall proceed in accordance with 85-2-307 through 85-2-309.
12 After the hearing provided in 85-2-309, the board shall
13 decide whether to reserve the water for the applicant. The
14 department's costs of giving notice, holding the hearing,
15 conducting investigations, and making records incurred in
16 acting upon the application to reserve water, except the
17 cost of salaries of the department's personnel, shall be
18 paid by the applicant. In addition, a reasonable proportion
19 of the department's cost of preparing an environmental
20 impact statement shall be paid by the applicant unless
21 waived by the department upon a showing of good cause by the
22 applicant.

23 ~~(3)~~(4) (a) The board may not adopt an order reserving
24 water unless the applicant establishes to the satisfaction
25 of the board:

1 ~~(a)~~(i) the purpose of the reservation;
 2 ~~(b)~~(ii) the need for the reservation;
 3 ~~(c)~~(iii) the amount of water necessary for the purpose
 4 of the reservation;
 5 ~~(d)~~(iv) that the reservation is in the public interest.

6 (b) In determining the public interest under
 7 subsection (4)(a)(iv), the board may not adopt an order
 8 reserving water for withdrawal and transport for use outside
 9 the state unless the applicant proves by clear and
 10 convincing evidence that:

11 (i) the proposed out-of-state use of water is not
 12 contrary to water conservation in Montana; and

13 (ii) the proposed out-of-state use of water is not
 14 otherwise detrimental to the public welfare of the citizens
 15 of Montana.

16 (c) In determining whether the applicant has proved by
 17 clear and convincing evidence that the requirements of
 18 subsections (4)(b)(i) and (4)(b)(ii) are met, the board
 19 shall consider the following factors:

20 (i) whether there are present or projected water
 21 shortages within the state of Montana;

22 (ii) whether the water that is the subject of the
 23 application could feasibly be transported to alleviate water
 24 shortages within the state of Montana;

25 (iii) the supply and sources of water available to the

1 applicant in the state where the applicant intends to use
2 the water; and

3 (iv) the demands placed on the applicant's supply in
4 the state where the applicant intends to use the water.

5 (d) When applying for a reservation to withdraw and
6 transport water for use outside the state, the applicant
7 shall submit to and comply with the laws of the state of
8 Montana governing the appropriation, lease, use, and
9 reservation of water.

10 (4)(5) If the purpose of the reservation requires
11 construction of a storage or diversion facility, the
12 applicant shall establish to the satisfaction of the board
13 that there will be progress toward completion of the
14 facility and accomplishment of the purpose with reasonable
15 diligence in accordance with an established plan.

16 (5)(6) The board shall limit any reservations after
17 May 9, 1979, for maintenance of minimum flow, level, or
18 quality of water that it awards at any point on a stream or
19 river to a maximum of 50% of the average annual flow of
20 record on gauged streams. Ungauged streams can be allocated
21 at the discretion of the board.

22 (6)(7) After the adoption of an order reserving
23 waters, the department may reject an application and refuse
24 a permit for the appropriation of reserved waters or may,
25 with the approval of the board, issue the permit subject to

1 such terms and conditions it considers necessary for the
2 protection of the objectives of the reservation.

3 ~~(7)~~(8) Any person desiring to use water reserved to a
4 conservation district for agricultural purposes shall make
5 application for such use with the district, and the district
6 upon approval of the application must inform the department
7 of the approved use. The department shall maintain records
8 of all uses of water reserved to conservation districts and
9 be responsible, when requested by the districts, for
10 rendering technical and administrative assistance within the
11 department's staffing and budgeting limitations in the
12 preparation and processing of such applications for the
13 conservation districts. The department shall, within its
14 staffing and budgeting limitations, complete any feasibility
15 study requested by the districts within 12 months of the
16 time the request was made. The board shall extend the time
17 allowed to develop a plan identifying projects for utilizing
18 a district's reservation so long as the conservation
19 district makes a good faith effort, within its staffing and
20 budget limitations, to develop a plan.

21 ~~(8)~~(9) A reservation under this section shall date
22 from the date the order reserving the water is adopted by
23 the board and shall not adversely affect any rights in
24 existence at that time.

25 ~~(9)~~(10) The board shall, periodically but at least once

1 every 10 years, review existing reservations to ensure that
2 the objectives of the reservation are being met. Where the
3 objectives of the reservation are not being met, the board
4 may extend, revoke, or modify the reservation.

5 ~~(10)~~(11) The board may modify an existing or future
6 order originally adopted to reserve water for the purpose of
7 maintaining minimum flow, level, or quality of water, so as
8 to reallocate such reservation or portion thereof to an
9 applicant who is a qualified reservant under this section.
10 Reallocation of reserved water may be made by the board
11 following notice and hearing wherein the board finds that
12 all or part of the reservation is not required for its
13 purpose and that the need for the reallocation has been
14 shown by the applicant to outweigh the need shown by the
15 original reservant. Reallocation of reserved water shall not
16 adversely affect the priority date of the reservation, and
17 the reservation shall retain its priority date despite
18 reallocation to a different entity for a different use. The
19 board may not reallocate water reserved under this section
20 on any stream or river more frequently than once every 5
21 years.

22 ~~(11)~~(12) Nothing in this section vests the board with
23 the authority to alter a water right that is not a
24 reservation.

25 (13) The department shall undertake a program to

1 educate the public, other state agencies, and political
2 subdivisions of the state as to the benefits of the
3 reservation process and the procedures to be followed to
4 secure the reservation of water. The department shall
5 provide technical assistance to other state agencies and
6 political subdivisions in applying for reservations under
7 this section.

8 (14) Water reserved under this section is not subject
9 to the state water leasing program established under
10 [section 14]."

11 NEW SECTION. Section 17. Reservations within Missouri
12 River basin. (1) The state or any agency or political
13 subdivision thereof or the United States or any agency
14 thereof that desires to apply for a reservation of water in
15 the Missouri River basin shall file a claim pursuant to
16 85-2-316 no later than July 1, 1987.

17 (2) The department shall provide technical and
18 financial assistance to other state agencies and political
19 subdivisions in applying for reservations within the
20 Missouri River basin.

21 (3) Before December 31, 1989, the board shall make a
22 final determination in accordance with 85-2-316 on all
23 applications filed before July 1, 1987, for reservations of
24 water in the Missouri River basin.

25 (4) Water reservations approved by the board under

1 this section have a priority date of July 1, 1985. The board
2 shall by order establish the relative priority of
3 applications approved under this section.

4 Section 18. Section 85-2-112, MCA, is amended to read:

5 "85-2-112. Department duties. The department shall:

6 (1) enforce and administer this chapter and rules
7 adopted by the board under 85-2-113, subject to the powers
8 and duties of the supreme court under 3-7-204;

9 (2) prescribe procedures, forms, and requirements for
10 applications, permits, certificates, claims of existing
11 rights, and proceedings under this chapter and prescribe the
12 information to be contained in any application, claim of
13 existing right, or other document to be filed with the
14 department under this chapter not inconsistent with the
15 requirements of this chapter;

16 (3) establish and keep in its Helena office a
17 centralized record system of all existing rights and a
18 public record of permits, certificates, claims of existing
19 rights, applications, and other documents filed in its
20 office under this chapter;

21 (4) in cooperation with other state agencies,
22 institutions, colleges, and universities, establish and
23 maintain a centralized and efficient water resources data
24 management system sufficient to make available and readily
25 accessible, in a usable format, to state agencies and other

1 interested persons, information on the state's water
2 resources, out-of-state water resources that affect the
3 state, existing and potential uses, and existing and
4 potential demand. All other state agencies, institutions,
5 and colleges and universities shall cooperate with the
6 department in the development and maintenance of this
7 system.

8 ~~(4)~~(5) cooperate with, assist, advise, and coordinate
9 plans and activities with the federal, state, and local
10 agencies in matters relating to this chapter;

11 ~~(5)~~(6) upon request by any person, cooperate with,
12 assist, and advise that person in matters pertaining to
13 measuring water or filing claims of existing rights with a
14 district court under this chapter;

15 ~~(6)~~(7) adopt rules necessary to reject, modify, or
16 condition permit applications in highly appropriated basins
17 or subbasins as provided in 85-2-319."

18 Section 19. Section 85-1-203, MCA, is amended to read:

19 "85-1-203. State water plan. (1) The department shall
20 gather from any source reliable information relating to
21 Montana's water resources and prepare therefrom a continuing
22 comprehensive inventory of the water resources of the state.
23 In preparing this inventory, the department may conduct
24 studies; adopt studies made by other competent water
25 resource groups, including federal, regional, state, or

1 private agencies; perform research or employ other competent
2 agencies to perform research on a contract basis; and hold
3 public hearings in affected areas at which all interested
4 parties shall be given an opportunity to appear.

5 (2) The department shall formulate and, with the
6 approval of the board, adopt and from time to time amend,
7 extend, or add to a comprehensive, coordinated multiple-use
8 water resources plan known as the "state water plan". The
9 state water plan may be formulated and adopted in sections,
10 these sections corresponding with hydrologic divisions of
11 the state. The state water plan shall set out a progressive
12 program for the conservation, development, and utilization
13 of the state's water resources and propose the most
14 effective means by which these water resources may be
15 applied for the benefit of the people, with due
16 consideration of alternative uses and combinations of uses.
17 Before adoption of the state water plan or any section
18 thereof, the department shall hold public hearings in the
19 state or in an area of the state encompassed by a section
20 thereof if adoption of a section is proposed. Notice of the
21 hearing or hearings shall be published for 2 consecutive
22 weeks in a newspaper of general county circulation in each
23 county encompassed by the proposed plan or section thereof
24 at least 30 days prior to the hearing.

25 (3) The department shall submit to the water policy

1 committee established in [section 21] and to each general
2 session of the legislature the state water plan or any
3 section thereof or amendments, additions, or revisions
4 thereto which the department has formulated and adopted.

5 (4) The department shall prepare a continuing
6 inventory of the groundwater resources of the state. The
7 groundwater inventory shall be included in the comprehensive
8 water resources inventory described in subsection (1) above
9 but shall be a separate component thereof.

10 (5) The department shall publish the comprehensive
11 inventory, the state water plan, the groundwater inventory,
12 or any part of each, and the department may assess and
13 collect a reasonable charge for these publications.

14 (6) In developing and revising the state water plan as
15 provided in this section, the department shall consult with
16 the water policy committee established in [section 21] and
17 solicit the advice of the committee in carrying out its
18 duties under this section."

19 Section 20. Section 85-1-621, MCA, is amended to read:

20 "85-1-621. Report to the legislature. The department
21 shall prepare a biennial report to the legislature
22 describing the status of the water development program. The
23 report must describe ongoing projects and activities and
24 those which have been completed during the biennium. The
25 report must identify and rank in order of priority the

1 projects for which the department desires to seek
2 congressional authorization and funding and the efforts the
3 department will undertake in attempting to secure such
4 authorization and funding. The report must also describe
5 proposed projects and activities for the coming biennium and
6 recommendations for necessary appropriations. A copy of the
7 report shall be submitted to the president of the senate and
8 the speaker of the house, to the members of the water policy
9 committee established in [section 21], and to such other
10 members of the legislature as may request a copy."

11 NEW SECTION. Section 21. Water policy committee.

12 (1) There is a permanent water policy committee of the
13 legislature. The committee consists of eight members. The
14 senate committee on committees and the speaker of the house
15 of representatives shall each appoint four members on a
16 bipartisan basis. The committee shall elect its chairman
17 and vice-chairman. The committee shall meet as often as
18 necessary, including during the interim between sessions, to
19 perform the duties specified within this section.

20 (2) On a continuing basis, the committee shall:

21 (a) advise the legislature on the adequacy of the
22 state's water policy and of important state, regional,
23 national, and international developments which affect
24 Montana's water resources;

25 (b) oversee the policies and activities of the

1 department of natural resources and conservation, other
2 state executive agencies, and other state institutions, as
3 they affect the water resources of the state; and

4 (c) communicate with the public on matters of water
5 policy as well as the water resources of the state.

6 (3) On a regular basis, the committee shall:

7 (a) analyze and comment on the state water plan
8 required by 85-1-203, when filed by the department;

9 (b) analyze and comment on the report of the status of
10 the state's water development program required by 85-1-621,
11 when filed by the department;

12 (c) analyze and comment on water-related research
13 undertaken by any state agency, institution, college, or
14 university;

15 (d) analyze, verify, and comment on the adequacy of
16 and information contained in the water resources data
17 management system maintained by the department under
18 85-2-112; and

19 (e) report to the legislature, not less than once
20 every biennium.

21 (4) The environmental quality council shall provide
22 staff assistance to the committee. The committee may
23 contract with experts and consultants, in addition to
24 receiving assistance from the environmental quality council,
25 in carrying out its duties under this section.

1 Section 22. Section 85-2-122, MCA, is amended to read:

2 "85-2-122. Penalties. A person who violates or refuses
3 or neglects to comply with 85-2-301,--85-2-402(1),--and
4 85-2-403(3) the provisions of this chapter, any order of the
5 department, or any rule of the board is guilty of a
6 misdemeanor."

7 NEW SECTION. Section 23. Extension of authority. Any
8 existing authority of the board and the department of
9 natural resources and conservation to make rules on the
10 subject of the provisions of this act is extended to the
11 provisions of this act.

12 Section 24. Section 7, Chapter 706, Laws of 1983, is
13 amended to read:

14 "Section 7. Termination date. ~~This--act~~ Section 4 of
15 [this act] terminates July 1, 1985. The other sections do
16 not terminate and are permanent law."

17 NEW SECTION. Section 25. Repealer. Section 85-2-104,
18 MCA, is repealed.

19 NEW SECTION. Section 26. Codification instruction.
20 Sections 14, 17, and 21 are intended to be codified as an
21 integral part of Title 85, chapter 2, and the provisions of
22 Title 85, chapter 2, apply to sections 14, 17, and 21.

23 NEW SECTION. Section 27. Severability. If a part of
24 this act is invalid, all valid parts that are severable from
25 the invalid part remain in effect. If a part of this act is

1 invalid in one or more of its applications, the part remains
2 in effect in all valid applications that are severable from
3 the invalid applications.

4 NEW SECTION. Section 28. Applicability. This act
5 applies to all permit applications, change in appropriation
6 right applications, water sales and lease applications, and
7 reservation applications filed and pending with the
8 department on July 1, 1985, but upon which a hearing under
9 Title 85, chapter 2, has not yet commenced.

10 NEW SECTION. Section 29. Effective date. This act is
11 effective July 1, 1985.

-End-

EXHIBIT 2
2/18/85

APPENDIX D:
PROPOSED LEGISLATION

PART I: TABLE OF CONTENTS TO LC 660

- Section 1 [p. 2]: Definitions (water) [MCA § 85-2-102]
- Section 2 [p. 5]: Department powers over state waters [MCA § 85-1-204]
- Section 3 [p. 7]: Right to appropriate [MCA § 85-2-301]
- Section 4 [p. 9]: Criteria for issuance of permit [MCA § 85-2-311]
- Section 5 [p. 13]: Terms of permit [MCA § 85-2-312]
- Section 6 [p. 14]: Fees for environmental impact statements [MCA § 85-2-124]
- Section 7 [p. 17]: Changes in appropriation rights [MCA § 85-2-402]
- Section 8 [p. 25]: Definitions (Major Facility Siting Act)
[MCA § 75-20-104]
- Section 9 [p. 29]: Study, evaluation, and report on proposed facility
(Major Facility Siting Act)[MCA § 75-20-216]
- Section 10 [p. 33]: Hearing date -- location -- department to act as
as staff -- hearings to be held jointly (Major
Facility Siting Act)[MCA § 75-20-218]
- Section 11 [p. 34]: Opinion issued with decision -- contents (Major
Facility Siting Act)[MCA § 75-20-303]
- Section 12 [p. 36]: Waiver of provisions of certification proceedings
(Major Facility Siting Act)[MCA § 75-20-304]
- Section 13 [p. 38]: Definitions (Major Facility Siting Act)
[MCA § 75-20-1202]
- Section ¹⁴~~13~~ [p. 39]: Water leasing program (New Section)

- Section 15 [p. 42]: Acquisition of water in federal reservoirs
[MCA § 85-1-205]
- Section 16 [p. 43]: Reservation of waters [MCA § 85-2-316]
- Section 17 [p. 49]: Reservations within Missouri River basin (New
Section)
- Section 18 [p. 50]: Department duties [MCA § 85-2-112]
- Section 19 [p. 51]: State water plan [MCA § 85-1-203]
- Section 20 [p. 53]: Report to the legislature [MCA § 85-1-621]
- Section 21 [p. 54]: Water policy committee (New Section)
- Section 22 [p. 56]: Penalties [MCA § 85-2-122]
- Section 23 [p. 56]: Extension of authority (New Section)
- Section 24 [p. 56]: Termination date [§ 7, ch, 706, Laws of 1983]
- Section 25 [p. 56]: Repealer (New Section)[MCA § 85-2-104]
- Section 26 [p. 56]: Codification instruction (New Section)
- Section 27 [p. 56]: Severability (New Section)
- Section 28 [p. 57]: Applicability (New Section)
- Section 29 [p. 57]: Effective date (New Section)

EXHIBIT 3

2/18/85

HB 680

Testimony Presented by Jim Flynn, Department
of Fish, Wildlife and Parks

February 18, 1985

Mr. Chairman, members of the committee, I appear before you today in support of HB 680, a bill to maximize Montana's interest in the interstate allocation of water, to provide for water reservations in the Missouri River Basin, and amend criteria for water appropriation. Water has always been a critical commodity in the West, and the creation of a permanent Water Policy Committee, proposed by this bill, illustrates the seriousness of this issue.

The concept of "water marketing" was introduced in the 1983 legislature. It was unfamiliar to most of us and raised more questions than it answered. The Select Committee on Water Marketing investigated the water marketing issue in detail and recognized the need to address broader water policy concerns.

We have reviewed HB 680 and commend the Select Committee for its efforts. This bill is timely and comprehensive. It protects Montana's fair share of the Missouri River and provides safeguards for existing and future needs. An accurate and timely adjudication is needed to quantify existing use in the basin. The timetable for the Missouri River water reservations will ensure that future consumptive and in-stream uses of water are quantified.

The fish and wildlife of the Missouri River Basin are nationally recognized. They are assured adequate consideration in a water reservation process and the adoption of reasonable use criteria. The Department supports HB 680 and would urge this committee to adopt the measure.

NORTHERN PLAINS RESOURCE COUNCIL

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Box 858
Helena, MT 59624
(406) 443-4965

Main Office
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Billings, MT 59101
(406) 248-1154

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Box 886
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TESTIMONY OF ROBERT GREEN ON HB 680

My name is Robert Green. My address is Tongue River Stage, Miles City. I live and work on the Tongue River as a member of a family farm corporation. We have developed about 350 acres of irrigation in the past 10 years and see the potential for another 300 acres in the future.

I am here today representing the Northern Plains Resource Council.

The Northern Plains Resource Council applauds the efforts of the Select Committee on Water and supports passage of the end results of those efforts, HB 680, in the form it was presented to you.

HB 680 is a far reaching and foresighted bill which enables the state to better protect its water resources and provides for orderly development of those resources. It is neither burdensome nor restrictive upon agriculture. Rather, it provides protection for existing rights and ensures availability of water for future agricultural development.

As an example of the need for this, I live next to the Powder River Basin. During the early 70's two industrial appropriators applied for permits to divert water for consumptive use. The Powder River has only enough unappropriated water to allow development of one of these applications. If and when that development takes place any future agricultural development would necessitate purchasing water from the Company. Just one industrial appropriation would close the Basin to future development for generations to come.

The lease concept embodied in HB 680 can prevent situations such as this in the future.

This bill also contains other provisions which would facilitate orderly development in the future:

The public interest criteria are necessary to give the Department of Natural Resources and Conservation a fair means of evaluating and judging an application.

We strongly support placing pipelines under the Major Facilities Siting Act.

We believe the expeditious development of a Reservation System on the Missouri River is imperative.

The formation of a standing Joint Water Committee and the development, implementation and periodic review of a State Water Plan also have our support.

Water has become very scarce and precious in some other western states. Water development in those states was not done in a prudent and orderly manner and some are now over appropriated. We will continue to see an increasing

number of High Court rulings affecting our rights and ability to develop our water resources. Passage of HB 680 will place Montana in a very good position with respect to recent rulings while at the same stroke providing a means of review to help maintain Montana's control over it's waters.

The only caution we would urge is that the bill be kept whole. A puzzle forms a complete picture when all the pieces are in place. This is a well researched well thought policy allowing Montana to maintain maximum control over it's water resources.

It will work as a package. It must be kept a package.

I wish to thank the Chairman and members of this committee for the opportunity to comment here today.

PIPELINES UNDER THE
MAJOR FACILITY SITING ACT

EXHIBIT 5
2/18/85

HB 680, SEC. 10

HB 680, recommended by the Select Committee on Water Marketing, Sec. 10 would place pipelines over 30 miles in length and seventeen inches in diameter under the Major Facility Siting Act (MFSA).

ENVIRONMENTAL IMPACTS

The environmental impacts of pipelines are similar to transmission lines, which are covered under the MFSA. Pipelines belong under the act. They can have significant environmental impacts when covering varied terrain. The disturbance of native ground cover in the right-of-way can cause problems with noxious weed invasion. There is also a need to separate topsoil from sub-surface soils for use in reclamation. Crossing diversified terrain causes problems with stream crossings and other "sensitive" areas (such as fragile alpine slopes, marginal vegetative cover, erosion-prone hillsides, etc.). Another major problem is the use of large volumes of water for hydro-static testing (which can dewater marginal streams and cause water pollution).

COMMITTEE RECOMMENDATIONS

The Select Committee recommends placing pipelines under the MFSA. The committee's recommendations are based on the need for adequate environmental review of possible coal slurry or water pipelines. Covering all types of pipelines is necessary for the statute to be constitutional, since pipelines of a similar environmental impact should not be regulated differently.

OPTIONS TO THE LEGISLATURE

1. Adopt current HB 680 language of seventeen inches and thirty miles.
2. Raise the diameter to twenty inches as supported by the oil and gas industry.
3. Lower the diameter to twelve or sixteen inches to cover all lines that require building an earthen pad for construction.
4. Base the cut off on something other than size.

RECOMMENDATIONS

* All lines that require the construction of level workpads should be covered by the MFSA. Such lines have significant environmental impacts since they require grading large right-of-ways (40 to 50 feet).

* Pipelines should be covered by the MFSA irrespective of the content of the line. Coverage of pipelines should be based on the environmental impacts, not the contents of the pipeline.

EXHIBIT 6
2/19/85

Testimony of Philip W. Davis
Before the House Natural Resources Committee
In Support of HB 680, February 18, 1985

My name is Philip Davis. I live and practice law in Bozeman. I serve on the Board of the Montana Environmental Information Center and I speak for the members of MEIC tonight.

The Montana Environmental Information Center has been actively involved in the question of water marketing since it became a hot issue in the 1983 Legislative session. We have closely followed the Select Committee's proceedings and publications and we have heard the arguments for eliminating the historic bans on exportation of water and on use of water for coal slurry purposes. While we accept these arguments as persuasive, our members are loath to give up these important safeguards too easily.

We are persuaded that the positive aspects of this bill provide adequate substitute safeguards to enable us to support it. In particular, the imposition of public interest criteria for applications to appropriate large quantifies of water, the completion of the water reservation system, and the inclusion of appropriately sized pipelines under the Major Facilities Siting Act, are aspects of the legislation which we strongly support.

Our position, then, on HB 680 is that we can and do support it as a whole package and as it is presently constituted and we will work for its passage. We will closely scrutinize amendments and if this bill, and its positive aspects, are undermined in any significant way, we will have no choice but to withdraw our support and devote our efforts to defeating the legislation as so amended.

EXHIBIT 6A
2/18/85

TESTIMONY IN SUPPORT OF HB 680

By Don Reed, Montana Environmental Information Center
February 18, 1985

Mr. Chairman and members of the House Natural Resource Committee, I'm Don Reed and I'm here on behalf of the members of the Montana Environmental Information Center in support of HB 680.

The Montana EIC has participated extensively in the interim committee's deliberations and endorses the package of recommendations in HB 680.

I would like to focus on one little-discussed element of HB 680, placing pipelines under the Major Facility Siting Act. The Select Committee specifically requested comments on what pipelines to cover. We offer our comments here not to criticize the bill, but to let you know what we think is most appropriate.

Section 10 of HB 680 calls for placing all pipelines over seventeen inches in diameter and 30 miles in length under the Siting Act. The key strength of the provision is that it covers all lines regardless of what is transported in the line. This is crucial given the finding of the Select Committee that future coal slurry pipelines might not use water as the transportation medium. More likely candidates are carbon monoxide and methane. Limiting Siting Act coverage to lines which use water would not cover such coal slurry lines.

Second, the determination of which lines ought to be covered should revolve around the environmental impacts of the pipelines. Major pipelines crossing diverse terrain have environmental impacts similar to those found with large electrical transmission lines, which are currently covered by the Siting Act. Such "linear facilities" cross diverse terrain, streams, roads, and environmentally sensitive areas. Moreover, a large pipeline requires the building of a level earthen pad in construction. This has a significant environmental impact. The right-of-way is graded. This creates the potential for noxious weed infestations in the right-of-way and requires the separation of topsoil for reclamation.

According to the Department of Natural Resources and Conservation, pipelines sixteen inches in diameter and greater require the building of earthen pads. We believe that this is the most appropriate cutoff for which pipelines ought to be covered by the Siting Act. It is based on environmental impacts, not what is carried in the line.

Those who oppose placing pipelines under the Siting Act often argue that the process is too cumbersome and takes too

long to permit a facility. Such arguments seemed to be based on the experience with power plants. The Siting Act also covers power transmission lines. Numerous powerlines have been permitted under the Siting Act.

An analysis of those power lines already covered by the Siting Act shows that some eighteen transmission lines have received Siting Act certificates. The average time between submission of a completed application and receiving the certificate has been fourteen and a half months. This shows that the Siting Act is capable of dealing with facilities similar to pipelines rather quickly.

We believe that experience shows that the regulation of pipelines under the Siting Act will not present an undue regulatory burden. The benefits of covering pipelines far outweigh those limited regulatory costs.

In summary, Montana EIC supports HB 680 in general, placing all pipelines regardless of contents under the Siting Act, and setting a size cutoff for pipelines that would cover pipelines sixteen inches in diameter and greater.

Thank you for this opportunity to comment.

Walleyes Unlimited OF MONTANA



BOX 1067
WOLF POINT, MONTANA 59201
February 18, 1985



Testimony Before the House Natural Resources Committee
HB680

-Wolf Point-

My name is Scott Ross. I am from ~~Helena~~. I represent Walleyes Unlimited of Montana, an organization of nearly four thousand Montana fishermen.

Walleyes Unlimited stands in support of HB680. Some of our concerns have been met by the development of a water leasing program which would be subject to review under Public Interest Criteria.

Walleyes Unlimited further supports the development of water reservations in the Missouri River Basin to insure that instream flow requirements for fisheries maintainance will be met. These fisheries contribute substantially to Montana's recreation resources and its recreation-related tourist industry. They merit protection by the development of reservations within the Missouri River Basin.

Thank you.

EXHIBIT 8
February 18, 1985 2/18/85

House Natural Resources Committee
State Capitol
Helena, Montana

Mr. Chairman and Members of the Committee:

For the Record, I am Vernon Westlake, chairman of the Water Committee for the Agricultural Preservation Association. Again, for the Record, Gallatin A.P.A. and Park County Legislative Association oppose H.B. 680 with reservations. I should like to explain why these groups have taken a position with reservations.

We are very concerned with Part A of the Recommendations to the 49th Legislature by the Select Water Marketing Committee. In our opinion, repealing "The Ban on Exportation of Water" at this time is premature, and Section 24 of H.B. 680 is not necessary.

We feel that changing the permit criteria from 10,000 acre-feet/year and 15 cubic feet/second to 4000 acre-feet/year and 5.5 cubic feet/second is not in the best interests of agriculture and especially for future instate development of irrigated agriculture, 4000 acre-feet or 5.5 cubic feet/second is not a large water right. In terms of miners inches, 5.5 cubic feet/second is a flow of 220 miners inches, and I venture to say that the majority of water rights in Gallatin, Park and Meagher counties exceed that amount.

We realize that the recommended change is addressing the unappropriated water in Montana, however, if this criteria is used to consider agricultural water right applications for the unappropriated water, it would, for all practical purposes, eliminate future development of irrigated agricultural land in Montana because the minimum is too small.

We think that Montana should be very careful about using water for coal slurry. Our main concern is the possible effect of causing railroads an additional financial problem. This, in turn, could reflect

in higher freight rates for transporting agricultural products to market.

We would support coverage of pipelines under the Major Facility Siting Act if and when, the pipelines were to be constructed. We believe that the general water adjudication process must be completed before any water pipeline construction should be permitted.

Part B of the Committee's recommendations addresses the State Water Leasing Program. Our groups feel that this program is premature, and that no leasing should be permitted until the general water adjudication process is completed. I should like to include a very important concept to consider in the future plan for water leasing.

Our groups are on record in support of the concept of Senator Story's S.B. 299. We recommend to the Committee that the DNRC should not have the authority to approve an application for either a permit or a temporary decree in the name of the Department for unappropriated water to sell or to lease. We believe that only the Court system should have jurisdiction for water appropriation. The DNRC should function only as an administrative agency for the State of Montana, regarding water use in state or out of state.

Part C of the Committee's Recommendations, titled Maximizing Montana's Fair Share of the Missouri River Basin Water, is the part of the bill that our groups very strongly support. We are on record as having supported general stream adjudication for the past several sessions, but we believe that the language in the bill is not adequate.

We believe that general stream adjudication must be completed in all the basins of Montana and preliminary decrees issued to all claimants before unappropriated water can be filed on for selling, leasing, irrigation, domestic, or other purposes, either intrastate or interstate use. We realize that this bill does provide that a

basin is adjudicated before unappropriated water could be filed on. Our groups do not approve a piece-meal basin-to-basin approach for allocation of unappropriated water. We feel that completion of the adjudication process will provide a complete inventory of the existing water use, and, in turn, give a real basis for a responsible water plan, thus enabling the development of a realistic water policy.

We believe that completion of the existing water use record will put Montana in a much stronger position, legally, than pushing for the immediate sale or lease of water for out-of-state use. Judge Lessley is predicting a completion of general stream adjudication within the next five to six years, and we feel that the Water Courts will be able to accomplish the task in this period of time, and will issue preliminary decrees in all basins by 1990.

We support Sections 15 through 21 of H.B. 680. We believe that former Senator Jean Turnage, now Chief Justice, was referring to these Sections in his letter to the Legislature. I quote: "Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set for an agenda of water issues that must be systematically addressed by the Legislature and citizens of the State in years to come."

I conclude by saying; Let's complete the general stream adjudication and then see how much unappropriated water we have for other uses, including sales, leasing, and all other purposes. We should move with caution in the development of a policy for marketing Montana water. There is sufficient time and adequate legislation to satisfy Constitutional requirements for control of Montana water to the benefit of all Montana water users.

Thank you for this opportunity of present our position.

Vernon L. Westlake
Vernon L. Westlake, chairman
Water Committee, A.P.A.

EXHIBIT 9
2/18/85

February 18, 1985

House of Natural Resources Committee:
Mr. Chairman & Members of the Committee:

For the Record, I am Bill Black, Gallatin Gateway, MT representing the Agricultural Preservation Association regarding HB680 'WATER MARKETING'.

We are opposed to selling any water, in-state or out-of-state, until the adjudication process is completed. The INSTREAM FLOW RESERVATION must be approached very carefully--when the water leaves the state's boundaries we've lost the beneficial use of this water.

At such time in the future, after the adjudication process is completed, and when our present and future water needs have been addressed a plan to market surplus water may be acceptable.

New section 23, (in HB680) lines 7-11 gives the board and the department of Natural Resources and Conservation the power to make and execute rules. I am fearful of this rule-making power regarding our water.

I want to give two examples of this fallacy:

1. June 7, 1984, Revenue Oversight Committee Hearing: I was present when a committee member asked the head of the Department of Revenue what rules they were going to implement. It was revealed that wells and sewer systems would be added to the property tax roll. A committee member noted that this might be like 'chasing a grizzly bear with a very short stick'.
2. Tuesday, February 5, 1985, Hearing on SB234 'To Prohibit the Department of Revenue From Using Replacement Cost As A Substitute For Market Value When Appraising Property For Tax Purposes'.
(This is a good bill--How would you like to have your house appraised at replacement cost rather than market value?)

My point here is that it was reported in the hearing by the Department of Revenue personnel that the department had changed manuals and were presently using a manual that listed machinery at a much higher value and it was also noted this manual listed obsolete items that parts are no longer available for. What is going to happen to International Farm Equipment sold today & in the next year or so regarding tax valuation? Dealerships have been notified to ship all parts on hand back to the factory--this machinery is totally obsolete, still being new.

The Department of Revenue personnel stated it was up to the department to make the rules that can only be removed by the legislature or for the legislature to make the laws.

The marketing of water in Montana must not be put in the hands of the Department of Natural Resources or a board with rule making authority. Water is the most important element known to mankind, therefore, we must have the most qualified people that we can find in charge.

In closing, may I remind you of April 15, the date we must have our IRS taxes paid. Do you qualify for a tax shelter or other tax relief or are you, like so many, caught-up in vast rules made by the IRS?--a department given its authority by your U. S. Congressmen!!

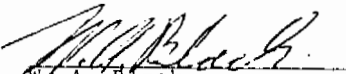

W. A. Black
75255 Gallatin Road
Gallatin Gateway, MT 59715



Exhibit 10
2/18/85

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

AFL-CIO—CLC

440 Roosevelt Drive

18th-February-1985

JAMES T. MULAR

State Director

~~110-867-888~~

Butte, MT 59701

Phone 406 494 2316

S T A T E M E N T O F

James T. Mular, State Legislative Director,
Brotherhood of Railway & Airline Clerks,
in opposition to House Bill # 680. Before
the Montana House of Representatives Natural
Resources Committee.....

Mr. Chairman, members of the Committee- For the record
my name is James T. Mular,... I am the State Legislative
Director of the Brotherhood of Railway & Airline Clerks.
By direction of our Montana membership; which consists of
over 2300 active and retired railroad clerks- This office
opposes HB 680's repealer on the ban for the use of water
for coal slurry purposes, pursuant to Section 85-2-104 MCA.

B A C K G R O U N D

The 48th Legislative Assembly created an Interim Water
Marketing Committee, because of the complexities of water
sales in commerce. Specifically to address legal language
and decisions made by the U.S. Supreme Court in the celebrated
Sporhase Case. Montana did resolve a 2 year suspension on
another statute that prohibited the export of Montana water.
And that's what Sporhase was all about. The Court in that
Case did not address Appropriation States rights to determine
what constitutes a BENEFICIAL USE OF WATER.. It merely addressed
reciprocity between Nebraska and Colorado, in the transport of
GROUND WATER. Many legal scholars have hassled with Western
State water laws. But- They've never come to a legal conclusion
premised on the Common Law Doctrine of Water Uses by appropriation.
Or for that matter any legal bans on specific uses such as
coal slurry transport.

In fact, Spohr addressed the transport of GROUND WATER and did not speak to free-flowing or stored surface water. That case dealt with water pumped from underground through a pipe that moved between Colorado and Nebraska. There was no coal mixed in with that water. Surface water in HB 680 in excess of 4,000 acre feet or 5.5 cubic feet per second became the sole jurisdiction administered by the State Department of Natural Resources and Conservation. It becomes a part of the Judicial Branch of state government and preempts certain judicial decisions.

We would direct the Committee to Senator Turnage's summation of a two-year study conducted by the Select Committee on Water Marketing. On page two of the report, Chairman Turnage stated:

"These recommendations concern a strategy for a water policy for Montana in an interstate setting."

The Committee addressed those key words of INTERSTATE SETTING. They, in fact, recommended that Section 85-1-121 MCA was suspect banning out-of-state exports of water. This alone resolved legal ambiguities in the Spohr Case. We allege the Select Committee did not approach Common Law Doctrine outlining APPROPRIATION OF WATER FOR SPECIFIC BENEFICIAL USE. Whenever an appropriation defines a beneficial use and denies a beneficial use for a specific undertaking -- that preempts the beneficial use such as denying the use of water and coal mixture for transporting coal.

Another factor surfaces relating to the transport of coal by water slurry pipelines. The only commodity that a slurry pipeline will transport is coal. If the railroad loses this traffic, I am sure that freight rates will increase drastically on agricultural commodities, forest products, and many industrial-mining commodities.

RAILROAD EMPLOYMENT IMPACT

My office submitted an inquiry to Burlington Northern's legal department on January 7, 1985, requesting present coal train operations and employee earnings. I am attaching a copy of that response for your information. Based on present coal haulage, the state realizes state income and property taxes on a two million dollar annual payroll. Multiply this times 50 years, and a 200 million dollar payroll becomes extinct if coal slurry comes into existence. What taxes will the coal slurry pipeline provide for Montana? And will the sale of water be earmarked for only water marketing plans? I suggest that this state will be building beaver dams all over the state, which will give no tax relief to its citizens -- just build more dams.

Montana's ban on coal slurry has been in existence for over 10 years. Chairman Turnage acknowledges the Committee's demonstration of wisdom on page one, where he states:

"There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the ETSI coal slurry pipeline conglomerate has fallen through."

Mr. Chairman and members of the Committee, I submit these questions of fact for your deliberations:

"Why does the DNRC want 50,000 acre feet as legislated in HB 680?"

"Could it be that Circle West is emerging because of the 30-mile criterion set in the bill?"

"Or does BN Holding Company, a resource-based entity, seek to build a coal slurry line in competition with its subsidiary BN railroad and CNW? After all, BN Holding owns El Paso Gas and Electric."

On the other hand, if DNRC does not have a prospective purchaser or leasee, why should we repeal the ban on coal slurry?

Senator Turnage said it well for the Select Committee when he concluded:

"This agenda is too important and too complex to be addressed by ONE INTERIM COMMITTEE or ONE LEGISLATIVE SESSION." , , , , , "The deliberations must be ongoing."

We submit that the good Senator is right. Because there is no known user large enough to build a coal slurry pipeline other than those mentioned herein.

Mr. Chairman, members of the Committee, I would direct you to the Mineral Leasing Act of 1920, as amended, in the U.S. Congress numbered as H.R. 1010, specifically page 19 of the Congressional report:

"Section 207 (a) of act specifies that State Law will control both substance and procedure for the acquisition and use of water within any state for coal pipelines" ...

And the report went on further to state:

"...that the use of eminent domain authority granted by this legislation should be subordinated to state authority...", etc.

Congress did in fact say that Montana's present ban on coal slurry preempts the commerce clause of the U.S. Constitution.

Therefore, Mr. Chairman and members of the Committee, we would offer an amendment striking the repealer on Montana's ban for the use of water in a coal slurry mixture, because surfacing Congressional legislation dealing with coal slurry transport would protect Montana's present law. Thank you.

A handwritten signature in cursive script, appearing to read "James Spuller".

BRAC PROPOSED AMENDMENT TO HB 680

Beginning on line 14, page 1, after the word COMMITTEE, strike REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY.

On line 20, page 1, strike REPEALING SECTION 85-2-104, MCA.

On page 5, line 22, after the word PURPOSE, add a semi-colon ";", and the words:
OTHER THAN FOR THE MIXTURE OF WATER FOR COAL SLURRY PURSUANT TO SECTION 85-2-104,
MCA.



BURLINGTON NORTHERN RAILROAD

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MICHAEL Y. CRILLY (406) 256-4388
General Manager Claims

January 15, 1985

Mr. Jim Mular
R.R. 1 - 440 Roosevelt Dr.
Butte, Montana 59701

Dear Jim:

In response to your inquiry, I have been advised that there are two coal trains per day leaving Sheridan via Forsyth - Glendive. The annual wages for crews and support personnel are as follows:

- A. Train and Engine Crew wages earned within Montana \$1,928,242.00 per year. This figure is arrived at by taking the gross earnings per trip, earned within Montana, \$1,785.41 times the number of trips, 1,080.
- B. Support Wages, Station and Office personnel and Maintenance of Way:
 1. Station and Office personnel, Hardin to Wibaux, approximate gross annual wage \$981,600.00. After reducing this figure to provide a pro-rata share for the 1,080 coal trains the figure is \$34,356.00.
 2. Maintenance of Way Gangs approximate gross annual wage is \$1,765,000.00. After the same appropriate reduction the figure is \$61,775.00.

Therefore, the approximate Montana gross annual wages attributable to the 1,080 coal trains running to and from Sheridan via Montana is \$2,024,373.00.

I hope this is the information you were seeking, if not or you need additional information, please advise.

Very truly yours,

Tom Spence

TS/sm
CC - Mr. John Delano

VISITOR'S REGISTER

HOUSE

NATURAL RESOURCES

COMMITTEE

BILL

680

DATE

2/10/85

SPONSOR

Iverson

NAME	RESIDENCE	REPRESENTING	SUP- PORT	OP- POSE
Willa Hall	Helena	League of Women Voters	✓	
Laura Nicholson	Helena	League of Women Voters	✓	
JAMES T. MULAR	Butte	Bro of Railway Clerks	AMNDX	
K.M. Kelly	Helena	Mont. Water Devel. Board	✓	
Ted J. Dorey	Helena	Self	✓	
Scott Ross	Helena	Walleyes Unlimited	✓	
VERNON WESTLAKE	BOZEMAN	A.P.A.		✓
Harry Murphy	Est. Falls	Mt. Farmers Union	✓	
Phil Preston	Montevideo	Memphers Co. Pres. Bd.		✓
W.D. Williams	Bozeman	A.P.A.		✓
John Shontz	Sidney MT	Richland CTY	X	
W.A. Black	Kalispell	ag. & water Prossess.		✓
Scott Brown	Helena	Compact Commission		
BRIAN DIETRICK	HELENA	SELF		
ROBERT GREEN	MILES CITY	NPRC	X	
Bill Asher	Bozeman	APA, PCA + MCPA		✓
Long Smith	Silesia	Self		✓
Don Reed	Helena	Montana EIC	✓	
Wink Davis	Bozeman	Montana EIC	✓	
Joe Brand	HELENA	SELF		✓

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

HOUSE NATURAL RESOURCES COMMITTEE

DATE 2/18/85

[illegible]

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES OF THE MEETING
NATURAL RESOURCES COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 20, 1985

The meeting of the Natural Resources Committee was called to order at 5:10 p.m. by Chairman Dennis Iverson in Room 312-1 of the State Capitol.

ROLL CALL: All members of the committee were present.

HOUSE BILL 711: House Bill 711 was introduced by sponsor Rep. Ben Cohen, District 3. Rep. Cohen explained that the bill would allow county governing bodies to limit or prohibit the sale of cleaning products that contain phosphorus. Phosphorus, he explained, is a nutrient that stimulates the growth of algae in lakes and streams, and contributes to the deterioration of water quality. The problem of algae growth is particularly severe in areas that depend economically on water quality, such as the Flathead Lake and Whitefish Lake areas, he explained. Rep. Cohen noted that the possible prohibition under HB 711 would apply only to cleaning compounds, and not to phosphorus products used in agriculture. He said phosphate bans have been successful in curbing algae growth problems in the Great Lakes region. He read a telegram in support of HB 711 from the Lake County Board of County Commissioners, a copy of which is attached hereto as Exhibit 1.

Jack Stanford, director of the University of Montana biological station at Yellow Bay on Flathead Lake, appeared in support of HB 711. He said research conducted at Yellow Bay since 1971 shows that Flathead Lake is beginning to suffer from algae blooms as a result of excessive phosphorus entering the lakes. He estimated that 4% to 10% of the phosphorus entering the lake comes from household detergents. That small percentage, he said, is enough to cause an algae bloom in a lake that is at a critical point, such as Flathead. A phosphorus ban could curtail or prevent algae blooms, he said. A copy of Dr. Stanford's testimony is attached as Exhibit 2.

Steve Pilcher spoke in favor of HB 711 on behalf of the Water Quality Bureau of DHES. He said the bill fits in well with the state's strategy of maintaining water quality in the Flathead basin. He said that studies have clearly shown that water quality is impaired by excessive phosphorus. He said that a ban on cleaning compounds containing phosphorus could not be justified in eastern Montana, but since HB 711 allows for prohibition on a county basis, the bill was reasonable. He presented the results of a shelf survey on the phosphorus content of a number of widely available cleaning products, a copy of which is attached as Exhibit 3.

HOUSE BILL 711: Rep. Ream moved DO PASS on HB 711. Rep. Smith said that if he were convinced that a phosphorus ban would make a difference in the water quality of Flathead Lake, he would vote for the bill, but after hearing the testimony given, he was not convinced that an improvement would result. Rep. Grady said he thought a ban on consumer products was a bad approach to the problem.

Rep. Miles said that failing to address the phosphorus problem because a group of "out of state people" saying markets would be closed is "absurd." She said the bill should be supported as a means of allowing local bodies to address their own problems.

Reps. Raney and Garcia expressed agreement with Rep. Miles.

Reps. Asay and Peterson commented that an educational program in the affected areas might be a better way to address the problems associated with phosphorus use.

Rep. Ream noted that there would be no enforcement problem with the bill because it does not prohibit the use of cleaners containing phosphorus, it simply allows counties to prohibit the sale of such products.

Rep. Cobb asked why such prohibition could not be done through the state water quality bureau now, and researcher Hugh Zackheim said that Rep. Cohen was not interested in drafting a statewide program, but rather a bill that would grant rule-making authority to individual counties.

The committee then voted on Rep. Ream's DO PASS motion, and HB 711 passed 11-7, with Reps. Smith, Cobb, Grady, O'Hara, Addy, Jones and Iverson voting no.

Rep. Kadas moved to pass the statement of intent with the bill, and that motion was approved with Reps. Cobb, Smith, and Grady voting no.

HOUSE BILL 680: Rep. Kadas moved DO PASS on HB 680, the water marketing bill, which was heard in committee on February 18. Deborah Schmidt, director of the Environmental Quality Council, presented two sets of amendments to HB 680, drafted in response to concerns expressed at the hearing. She explained that although most of the amendments were clerical, some were substantial, and related to the provisions of HB 680 dealing with pipelines. It was the intent of the drafters of the bill to include all pipelines in excess of thirty miles and 17" in diameter under the Major Facility Siting Act, exempting oil and gas gathering lines. The amendments clarify that, she said, and have been reviewed and approved by representatives of the oil and gas industry.

Rep. Ream moved the set of amendments presented by Ms. Schmidt. Rep. Kadas moved the first four of five amendments suggested by DNRC, and Rep. Grady moved the fifth. All of the amendments were approved by the committee, and are noted on the attached standing committee report.

Rep. Driscoll moved to amend HB 680 to reinstate the ban on the use of water for coal slurry pipelines, as suggested by James Mular of the Brotherhood of Railway and Airline Clerks. Rep. Iverson resisted that amendment, saying of HB 680, "if we take pieces out, it falls apart." He emphasized that the ban on the use of water for coal slurry provides no guarantee to railroads that coal slurry could not be done using other substances, and opens the state to expensive litigation, which it would lose.

Rep. Miles said she would "love to keep the ban, but its not possible," and resisted the proposed amendment.

Rep. Garcia said that Burlington Northern, as a major employer in the state, deserves support, and endorsed the amendment.

The proposed amendment failed on a 12-5 roll call vote, a copy of which is attached.

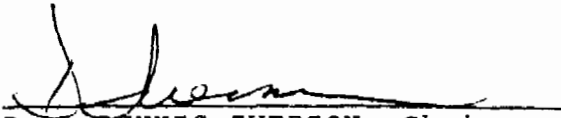
Rep. Driscoll moved to amend HB 680 to make sure that a 30-mile pipeline, only part of which lies with Montana's borders, would still be included under the Major Facility Siting Act. That amendment was unanimously approved.

Rep. Kadas asked if the committee should consider amending the bill to make pipelines of less than 17" in diameter fall under the siting act. Rep. Iverson said there would be no point in doing so, and that the 17" limit had been carefully chosen to include water pipelines, but exclude oil and gas lines.

Rep. Iverson said that with the 17" provision, the "chances are slim to none" that coal slurry pipelines could avoid regulation under the siting act, and that there is little risk of including pipelines in the siting act unnecessarily.

The committee then voted on Rep. Kadas's motion of DO PASS AS AMENDED, which was unanimously approved.

There being no further business before the committee, the meeting was adjourned at 9:50 p.m.



Rep. DENNIS IVERSON, Chairman

DAILY ROLL CALL

HOUSE NATURAL RESOURCES

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date February 20, 1985

NAME	PRESENT	ABSENT	EXCUSED
IVERSON, Dennis (Chairman)	X		
KADAS, Mike (Vice-Chairman)	X		
ADDY, Kelly	X		
ASAY, Tom	X		
COBB, John	X		
DRISCOLL, Jerry	X		
GARCIA, Rodney	X		
GRADY, Edward	X		
HARP, John	X		
JONES, Tom	X		
KRUEGER, Kurt	X		
MILES, Joan	X		
MOORE, Janet	X		
O'HARA, Jesse	X		
PETERSON, Mary Lou	X		
RANEY, Bob	X		
REAM, Bob	X		
SMITH, Clyde	X		

ROLL CALL VOTE

HOUSE COMMITTEE NATURAL RESOURCES

DATE Feb. 20 BILL NO. 680 TIME 9 p.m.

NAME	AYE	NAY
IVERSON, Dennis (Chairman)		X
KADAS, Mike (Vice-Chairman)		X
ADDY, Kelly		X
ASAY, Tom		X
COBB, John		X
DRISCOLL, Jerry	X	
GARCIA, Rodney	X	
GRADY, Edward		X
HARP, John		X
JONES, Tom	X	
KRUEGER, Kurt	X	
MILES, Joan		X
MOORE, Janet		X
O'HARA, Jesse		X
PETERSON, Mary Lou		X
RANEY, Bob	X	
REAM, Bob		X
SMITH, Clyde		X

5 12

Secretary _____ Chairman _____

Motion: Rep. Driscoll - amend HB 680 to reinstate ban on
use of water for coal slurry.

STANDING COMMITTEE REPORT

Page 1 of 4

February 20 19 35

MR. SPEAKER

We, your committee on NATURAL RESOURCES

having had under consideration HOUSE Bill No. 680

FIRST reading copy (WHITE)
color

AN ACT REVISING STATE WATER POLICY

Respectfully report as follows: That HOUSE Bill No. 690

BE AMENDED AS FOLLOWS:

- 1) Title, line 16.
Following: line 15
Strike: "75-20-216,"
Following: "75-20-303"
Strike: "75-20-304,"
- 2) Page 3, line 11.
Following: "[section"
Strike: "14"
Insert: "12"
- 3) Page 3, line 13.
Following: "[section"
Strike: "14"
Insert: "12"

~~XXXXXX~~

- 4) Page 5, line 24.
Following: "[section"
Strike: "14"
Insert: "12"
- 5) Page 8, line 4.
Strike: "under 85-2-311"
- 6) Page 8, line 23.
Following: "[section"
Strike: "14"
Insert: "12"
- 7) Page 13, lines 21 and 22.
Strike: "Based upon the criteria listed in 85-2-311, the"
Insert: "The"
- 8) Page 13, line 24.
Following: "necessary"
Insert: "protect the rights of other persons and"
- 10) Page 25, line 21.
Following: "dams"
Insert: "pipelines,"
- 9) Page 24, line 7.
Strike: "protect the rights of other persons and"
- 11) Page 25, line 25.
Following: "facility"
Insert: ", or a natural gas or crude oil gathering line 17 inches or less in diameter"
- 12) Page 27, lines 13 through 16.
Following: "refineries"
Strike: the remainder of line 13 through "gas," on line 16
- 13) Page 28, lines 13 through 22.
Following: line 17
Strike: subsection (c) in its entirety
Re-number subsequent subsections.
- 14) Page 28, line 23.
Following: "pipeline"
Insert: ", whether partially or wholly within the state,"

- 15) Page 29, line 20 through page 33, line 4.
Following: line 19 on page 29
Strike: section 9 in its entirety
Renumber subsequent sections
- 16) Page 35, line 14.
Following: "(b)"
Strike: "1"
Following: "or"
Insert: "or"
Following: "(c)"
Strike: the remainder of line 14
- 17) Page 35, line 17.
Following: "(b)"
Strike: the remainder of line 17
- 18) Page 36, line 6 through page 38, line 23.
Following: line 5 on page 36
Strike: section 12 in its entirety
Renumber subsequent sections.
- 19) Page 49, line 10.
Following: "[section]"
Strike: "14"
Insert: "12"
-
- 20) Page 49, line 17.
Following: "(2)"
Strike: "The"
Insert: "Subject to legislative appropriation, the"
- 21) Page 53, line 1.
Following: "[section]"
Strike: "21"
Insert: "19"
- 22) Page 53, line 16.
Following: "[section]"
Strike: "21"
Insert: "19"
- 23) Page 54, line 9.
Following: "[section]"
Strike: "21"
Insert: "19"

February 20 19 85

- 24) Page 56, line 20.
Following: "Sections"
Strike: "14, 17, and 21"
Insert: "12, 15, and 19"
- 25) Page 56, line 22.
Following: "sections"
Strike: "14, 17, and 21"
Insert: "12, 15, and 19"

AND AS AMENDED,

DO PASS

1 HOUSE BILL NO. 680

2 INTRODUCED BY IVERSON, BLAYLOCK, HARP, SHAW,

3 ASAY, CODY, HOLLIDAY, HARPER, MARKS, NEUMAN,

4 ABRAMS, D. BROWN, VAN VALKENBURG, KADAS,

5 VINCENT, DONALDSON, NATHE, BRADLEY,

6 POFF, TVEIT, E. SMITH, BARDANOUVE

7 BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

8
9 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER
10 POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE
11 ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER
12 APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A
13 LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS
14 FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER
15 THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER
16 RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A
17 WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT
18 WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF
19 WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104,
20 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202,
21 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112,
22 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316,
23 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983;
24 REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE
25 DATE AND AN APPLICABILITY DATE."

1
2 WHEREAS, the Select Committee on Water Marketing was
3 commissioned by the 1983 Legislature to undertake a study of
4 the advantages and disadvantages of water marketing; and

5 WHEREAS, the Select Committee in completing its study
6 determined that Montana needs to address broader questions
7 of water policy in order to secure Montana's interests in
8 allocation and management of state waters; and

9 WHEREAS, the Select Committee has presented a
10 comprehensive package of recommendations that must be
11 considered as a whole; and

12 WHEREAS, these recommendations serve to revise
13 Montana's water policy in order to maximize Montana's
14 authority over management of state waters and other natural
15 resources and to conserve water for existing and future
16 beneficial uses by Montanans.

17 THEREFORE, the Legislature of the State of Montana
18 finds that this legislation and other recommendations of the
19 Select Committee on Water Marketing constitute an
20 appropriate revision of state water policy necessary to
21 secure Montana's interests for present and future benefit to
22 Montanans.

23
24 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

25 Section 1. Section 85-2-102, MCA, is amended to read:

THIRD READING

-2-

HB 680



There are no changes in HB 680, and due to length will not be rerun. Please refer to yellow copy for complete text.

APPROVED BY COMM. ON
NATURAL RESOURCES

HOUSE BILL NO. 680

INTRODUCED BY IVERSON, BLAYLOCK, HARP, SHAW,
ASAY, CODY, HOLLIDAY, HARPER, MARKS, NEUMAN,

ABRAMS, D. BROWN, VAN VALKENBURG, KADAS,

VINCENT, DONALDSON, NATHE, BRADLEY,

POFF, TVEIT, E. SMITH, BARDANOUVE

BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104, 75-20-216, 75-20-218, 75-20-303, 75-20-304, 75-20-1202, 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102, 85-2-112, 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312, 85-2-316, 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF 1983; REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

SECOND READING

1 "85-2-102. Definitions. Unless the context requires
2 otherwise, in this chapter the following definitions apply:

3 (1) "Appropriate" means to divert, impound, or
4 withdraw (including by stock for stock water) a quantity of
5 water or, in the case of a public agency, to reserve water
6 in accordance with 85-2-316.

7 (2) "Beneficial use", unless otherwise provided,
8 means:

9 (a) a use of water for the benefit of the
10 appropriator, other persons, or the public, including but
11 not limited to agricultural (including stock water),
12 domestic, fish and wildlife, industrial, irrigation, mining,
13 municipal, power, and recreational uses; and

14 (b) a use of water appropriated by the department for
15 the state water leasing program under [section 14 12] and of
16 water leased under a valid lease issued by the department
17 under [section 14 12].

18 (3) "Board" means the board of natural resources and
19 conservation provided for in 2-15-3302.

20 (4) "Certificate" means a certificate of water right
21 issued by the department.

22 (5) "Change in appropriation right" means a change in
23 the place of diversion, the place of use, the purpose of
24 use, or the place of storage.

25 (6) "Declaration" means the declaration of an

1 existing right filed with the department under section 8,
2 Chapter 452, Laws of 1973.

3 (7) "Department" means the department of natural
4 resources and conservation provided for in Title 2, chapter
5 15, part 33.

6 (8) "Existing right" means a right to the use of
7 water which would be protected under the law as it existed
8 prior to July 1, 1973.

9 (9) "Groundwater" means any water beneath the land
10 surface or beneath the bed of a stream, lake, reservoir, or
11 other body of surface water, and which is not a part of that
12 surface water.

13 (10) "Permit" means the permit to appropriate issued
14 by the department under 85-2-301 through 85-2-303 and
15 85-2-306 through 85-2-314.

16 (11) "Person" means an individual, association,
17 partnership, corporation, state agency, political
18 subdivision, the United States or any agency thereof, or any
19 other entity.

20 (12) "Political subdivision" means any county,
21 incorporated city or town, public corporation, or district
22 created pursuant to state law or other public body of the
23 state empowered to appropriate water but not a private
24 corporation, association, or group.

25 (13) "Slurry" means a mixture of water and insoluble

1 ~~material.~~

2 (13) "Waste" means the unreasonable loss of water
3 through the design or negligent operation of an
4 appropriation or water distribution facility or the
5 application of water to anything but a beneficial use.

6 (14) "Water" means all water of the state, surface and
7 subsurface, regardless of its character or manner of
8 occurrence, including but not limited to geothermal water,
9 diffuse surface water, and sewage effluent.

10 (15) "Water division" means a drainage basin as defined
11 in 3-7-102.

12 (16) "Water judge" means a judge as provided for in
13 Title 3, chapter 7.

14 (17) "Water master" means a master as provided for in
15 Title 3, chapter 7.

16 (18) "Well" means any artificial opening or excavation
17 in the ground, however made, by which groundwater is sought
18 or can be obtained or through which it flows under natural
19 pressures or is artificially withdrawn."

20 Section 2. Section 85-1-204, MCA, is amended to read:

21 "85-1-204. Department powers over state waters. (1)
22 The department, with the approval of the board, may sell,
23 lease, and otherwise dispose of all waters which may be
24 impounded under this chapter, and the water may be sold for
25 the purpose of irrigation, development of power, watering of

1 stock, or any other purpose. The department may also lease
2 water under the state water leasing program established
3 under the provisions of [section 4 12]. To the extent that
4 it may be necessary to carry out this chapter and subject to
5 a compliance with the other provisions of this chapter, the
6 department has full control of all the water of the state
7 not under the exclusive control of the United States and not
8 vested in private ownership, and it shall take such steps as
9 may be necessary to appropriate and conserve the same for
10 the use of the people. The authority of the department
11 conferred by this chapter extends and applies to rights to
12 the natural flow of the waters of this state which it may
13 acquire, with the approval of the board, by condemnation,
14 purchase, exchange, appropriation, or agreement.

15 (2) For the purpose of regulating the diversion of
16 those waters, the department may enter upon the means and
17 place of use of all appropriators for making surveys of
18 respective rights and seasonal needs.

19 (3) The department may take into consideration the
20 decrees of the courts of this state having jurisdiction
21 which purport to adjudicate the waters of a stream or its
22 tributaries, and a fair, reasonable, and equitable
23 reconciliation shall be made between the claimants asserting
24 rights under different decrees and between decreed rights
25 and asserted rights of appropriation not adjudicated by any

1 court.

2 (4) The department, at its discretion, may hold
3 hearings relating to the rights of respective claimants
4 after first giving such notice as it considers appropriate
5 and make findings of the date and quantity of appropriation
6 and use of all claimants which the department will recognize
7 and observe in diverting the waters which it owns. The
8 department may police and distribute to the owner of the
9 recognized appropriation the waters due him upon request and
10 under terms agreed upon.

11 (5) The department, when engaged in controlling and
12 dividing the natural flow of a stream under the authority
13 granted by this chapter, is exercising a police power of the
14 state, and water commissioners appointed by any court may
15 not deprive the department of any of the waters owned or
16 administered under agreement with respective owners. The
17 owner of a prior right contending that the department is not
18 recognizing and respecting the appropriation may resort to a
19 court for the purpose of determining whether or not the
20 rights of the claimant have been invaded, and the department
21 shall observe the terms of the final decree.

22 (6) When the department impounds or acquires the right
23 of appropriation of the waters of a stream it may divert or
24 authorize the diversion at any point on the stream or any
25 portion thereof when it is done without injury to a prior

1 appropriator."

2 Section 3. Section 85-2-301, MCA, is amended to read:
3 "85-2-301. Right to appropriate. (1) After July 1,
4 1973, a person may not appropriate water except as provided
5 in this chapter. A person may only appropriate water for a
6 beneficial use.

7 (2) (a) Only the department may appropriate water by
8 permit under 85-2-311 in either of the following instances:

9 (i) for transport outside the following river basins:

10 (A) the Clark Fork River and its tributaries to its
11 confluence with Lake Pend Oreille in Idaho;

12 (B) the Kootenai River and its tributaries to its
13 confluence with Kootenay Lake in British Columbia;

14 (C) the St. Mary River and its tributaries to its
15 confluence with the Oldman River in Alberta;

16 (D) the Little Missouri River and its tributaries to
17 its confluence with Lake Sakakawea in North Dakota;

18 (E) the Missouri River and its tributaries to its
19 confluence with the Yellowstone River in North Dakota; and

20 (F) the Yellowstone River to its confluence with the
21 Missouri River in North Dakota; or

22 (ii) whenever water in excess of 4,000 acre-feet a year
23 and 5.5 cubic feet per second, for any use, is to be
24 consumed.

25 (b) Water for these purposes or in these amounts may

1 be leased from the department by any person under the
2 provisions of [section 14 12].

3 (3) A right to appropriate water may not be acquired
4 by any other method, including by adverse use, adverse
5 possession, prescription, or estoppel. The method prescribed
6 by this chapter is exclusive."

7 Section 4. Section 85-2-311, MCA, is amended to read:

8 "85-2-311. Criteria for issuance of permit. (1) Except
9 as provided in subsections (2) and--~~(3)~~ through (4), the
10 department shall issue a permit if the applicant proves by
11 substantial credible evidence that the following criteria
12 are met:

13 (a) there are unappropriated waters in the source of
14 supply:

15 (i) at times when the water can be put to the use
16 proposed by the applicant;

17 (ii) in the amount the applicant seeks to appropriate;
18 and

19 (iii) throughout the period during which the applicant
20 seeks to appropriate, the amount requested is available;

21 (b) the water rights of a prior appropriator will not
22 be adversely affected;

23 (c) the proposed means of diversion, construction, and
24 operation of the appropriation works are adequate;

25 (d) the proposed use of water is a beneficial use;

1 (e) the proposed use will not interfere unreasonably
2 with other planned uses or developments for which a permit
3 has been issued or for which water has been reserved.

4 ~~(2)~~ (2) The department may not issue a permit for an
5 appropriation of ~~10,000~~ 4,000 or more acre-feet of water a
6 year ~~or 15~~ and 5.5 or more cubic feet per second of water
7 unless ~~it affirmatively finds the applicant proves by clear~~
8 and convincing evidence that:

9 ~~(i)~~ (a) the criteria in subsection (1) are met;

10 ~~(ii)~~ (b) the ~~applicant has proven by clear and~~
11 ~~convincing evidence that~~ the rights of a prior appropriator
12 will not be adversely affected;

13 ~~(iii)~~ (c) the proposed appropriation is a reasonable
14 use. Such a finding shall be based on a consideration of the
15 following:

16 ~~(A)~~ (i) the existing demands on the state water supply,
17 as well as projected demands such as reservations of water
18 for future beneficial purposes, including municipal water
19 supplies, irrigation systems, and minimum streamflows for
20 the protection of existing water rights and aquatic life;

21 ~~(B)~~ (ii) the benefits to the applicant and the state;

22 ~~(C)~~ (iii) the economic feasibility of the project;

23 ~~(D)~~ (iv) the effects on the quantity, and quality, ~~and~~
24 ~~potability~~ of water for existing beneficial uses in the
25 source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

{B}{v} the effects on private property rights by any creation of or contribution to saline seep; and

{F}{vi} the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

{b}--A permit for an appropriation for a diversion--for a--consumptive--use--of--10,000--or--more--acre--feet--of--water--a--year--or--15--or--more--cubic--feet--per--second--of--water--under--this subsection--may--not--be--issued--unless--the--department--petitions the--legislature--and--the--legislature--affirms--the--findings--of the--department--

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the

appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

1 (d) When applying for a permit or a lease to withdraw
 2 and transport water for use outside the state, the applicant
 3 shall submit to and comply with the laws of the state of
 4 Montana governing the appropriation, lease, and use of
 5 water.

6 ~~(3)~~(4) An appropriation, diversion, impoundment, use,
 7 restraint, or attempted appropriation, diversion,
 8 impoundment, use, or restraint contrary to the provisions of
 9 this section is ~~null-and-void~~ invalid. No officer, agent,
 10 agency, or employee of the state may knowingly permit, aid,
 11 or assist in any manner such unauthorized appropriation,
 12 diversion, impoundment, use, or other restraint. No person
 13 or corporation may, directly or indirectly, personally or
 14 through an agent, officer, or employee, attempt to
 15 appropriate, divert, impound, use, or otherwise restrain or
 16 control waters within the boundaries of this state except
 17 in accordance with this section."

18 Section 5. Section 85-2-312, MCA, is amended to read:

19 "85-2-312. Terms of permit. (1) The department may
 20 issue a permit for less than the amount of water requested,
 21 but in no case may it issue a permit for more water than is
 22 requested or than can be beneficially used without waste for
 23 the purpose stated in the application. The department may
 24 require modification of plans and specifications for the
 25 appropriation or related diversion or construction. ~~It Based~~

1 ~~upon the criteria listed in 85-2-311; the~~ THE department may
 2 issue a permit subject to terms, conditions, restrictions,
 3 and limitations it considers necessary ~~to protect the rights~~
 4 ~~of other appropriators~~ TO SATISFY THE CRITERIA LISTED IN
 5 85-2-311, and it may issue temporary or seasonal permits. A
 6 permit shall be issued subject to existing rights and any
 7 final determination of those rights made under this chapter.

8 (2) The department may limit the time for commencement
 9 of the appropriation works, completion of construction, and
 10 actual application of the water to the proposed beneficial
 11 use. In fixing those time limits, the department shall
 12 consider the cost and magnitude of the project, the
 13 engineering and physical features to be encountered, and, on
 14 projects designed for gradual development and gradually
 15 increased use of water, the time reasonably necessary for
 16 that gradual development and increased use. For good cause
 17 shown by the permittee, the department may in its discretion
 18 reasonably extend time limits.

19 (3) The original of the permit shall be sent to the
 20 permittee, and a copy shall be kept in the office of the
 21 department in Helena.

22 (4) The department shall provide to the county clerk
 23 and recorder of the county wherein the point of diversion or
 24 place of use is located quarterly reports and an annual
 25 summary report of all water right permits, certificates, and

1 change approvals issued by the department within the
2 county."

3 Section 6. Section 85-2-124, MCA, is amended to read:

4 "85-2-124. Fees for environmental impact statements.

5 (1) Whenever the department determines that the filing of an
6 application (or a combination of applications) for a permit
7 or approval under this chapter requires the preparation of
8 an environmental impact statement as prescribed by the
9 Montana Environmental Policy Act and the application (or
10 combination of applications) involves the use of ~~10,000~~
11 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic
12 feet per second of water, the applicant shall pay to the
13 department the fee prescribed in this section. The
14 department shall notify the applicant in writing within 90
15 days of receipt of a correct and complete application (or a
16 combination of applications) if it determines that an
17 environmental impact statement and fee is required.

18 (2) Upon notification by the department under
19 subsection (1), the applicant shall pay a fee based upon the
20 estimated cost of constructing, repairing, or changing the
21 appropriation and diversion facilities as herein provided.
22 The maximum fee that shall be paid to the department may not
23 exceed the fees set forth in the following declining scale:
24 2% of the estimated cost up to \$1 million; plus 1% of the
25 estimated cost over \$1 million and up to \$20 million; plus

1 1/2 of 1% of the estimated cost over \$20 million and up to
2 \$100 million; plus 1/4 of 1% of the estimated cost over \$100
3 million and up to \$300 million; plus 1/8 of 1% of the
4 estimated cost over \$300 million. The fee shall be
5 deposited in the state special revenue fund to be used by
6 the department only to comply with the Montana Environmental
7 Policy Act in connection with the application(s). Any
8 amounts paid by the applicant but not actually expended by
9 the department shall be refunded to the applicant.

10 (3) The department and the applicant may determine by
11 agreement the estimated cost of any facility for purposes of
12 computing the amount of the fee to be paid to the department
13 by the applicant. The department may contract with an
14 applicant for:

15 (a) the development of information by the applicant or
16 a third party on behalf of the department and the applicant
17 concerning the environmental impact of any proposed activity
18 under an application;

19 (b) the division of responsibility between the
20 department and an applicant for supervision over, control
21 of, and payment for the development of information by the
22 applicant or a third party on behalf of the department and
23 the applicant under any such contract or contracts;

24 (c) the use or nonuse of a fee or any part thereof
25 paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant at the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a certificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This section shall apply to all applications, pending or hereinafter filed, for which the department has not, as of April 9, 1975, commenced writing an environmental impact statement. This section shall not apply to any application, the fee for which would not exceed \$2,500.

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may in its discretion rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its

environmental impact statement."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. ~~{1}--An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.~~

~~{2}--The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons, if the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307, if the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308{2}, and hearings shall be held in accordance with 85-2-309.~~

~~{3}--An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or irrigation use to an industrial use.~~

~~{4}--The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other~~

appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(6) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its

approval or denial of the proposed change. Objections must meet the requirements of 85-2-308, and hearings must be held in accordance with 85-2-309. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by clear and convincing evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration

of:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after a public hearing.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after a public hearing that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens

1 of Montana.

2 (c) In determining whether the appropriator has proved
3 by clear and convincing evidence that the requirements of
4 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
5 department and, if applicable, the legislature shall
6 consider the following factors:

7 (i) whether there are present or projected water
8 shortages within the state of Montana;

9 (ii) whether the water that is the subject of the
10 proposed change in appropriation might feasibly be
11 transported to alleviate water shortages within the state of
12 Montana;

13 (iii) the supply and sources of water available to the
14 applicant in the state where the applicant intends to use
15 the water; and

16 (iv) the demands placed on the applicant's supply in
17 the state where the applicant intends to use the water.

18 (d) When applying for a change in appropriation right
19 to withdraw and transport water for use outside the state,
20 the applicant shall submit to and comply with the laws of
21 the state of Montana governing the appropriation and use of
22 water.

23 (6) For any application for a change in appropriation
24 right involving 4,000 or more acre-feet of water a year and
25 5.5 or more cubic feet per second of water, the department

1 shall give notice of the proposed change in accordance with
2 85-2-307 and shall hold a hearing in accordance with
3 85-2-309 prior to its approval or denial of the proposed
4 change. The department shall provide notice and may hold a
5 hearing upon any other proposed change if it determines that
6 such a change might adversely affect the rights of other
7 persons.

8 (7) The department or the legislature, if applicable,
9 may approve a change subject to such terms, conditions,
10 restrictions, and limitations as it considers necessary to
11 ~~protect the rights of other persons and~~ satisfy the criteria
12 of this section, including limitations on the time for
13 completion of the change.

14 (8) If a change is not completed as approved by the
15 department or legislature or if the terms, conditions,
16 restrictions, and limitations of the change approval are not
17 complied with, the department may, after notice and
18 opportunity for hearing, require the appropriator to show
19 cause why the change approval should not be modified or
20 revoked. If the appropriator fails to show sufficient
21 cause, the department may modify or revoke the change
22 approval.

23 †††(9) The original of a change approval issued by the
24 department must be sent to the applicant, and a duplicate
25 must be kept in the office of the department in Helena.

1 ~~(8)~~(10) A person holding an issued permit or change
2 approval that has not been perfected may change the place of
3 diversion, place of use, purpose of use, or place of storage
4 by filing an application for change pursuant to this
5 section.

6 (11) A change in appropriation right contrary to the
7 provisions of this section is invalid. No officer, agent,
8 agency, or employee of the state may knowingly permit, aid,
9 or assist in any manner such unauthorized change in
10 appropriation right. No person or corporation may, directly
11 or indirectly, personally or through an agent, officer, or
12 employee, attempt to change an appropriation right except in
13 accordance with this section."

14 Section 8. Section 75-20-104, MCA, is amended to read:

15 "75-20-104. Definitions. In this chapter, unless the
16 context requires otherwise, the following definitions apply:

17 (1) "Addition thereto" means the installation of new
18 machinery and equipment which would significantly change the
19 conditions under which the facility is operated.

20 (2) "Application" means an application for a
21 certificate submitted in accordance with this chapter and
22 the rules adopted hereunder.

23 (3) "Associated facilities" includes but is not
24 limited to transportation links of any kind, aqueducts,
25 diversion dams, PIPELINES, transmission substations, storage

1 ponds, reservoirs, and any other device or equipment
2 associated with the production or delivery of the energy
3 form or product produced by a facility, except that the term
4 does not include a facility OR A NATURAL GAS OR CRUDE OIL
5 GATHERING LINE 17 INCHES OR LESS IN DIAMETER.

6 (4) "Board" means the board of natural resources and
7 conservation provided for in 2-15-3302.

8 (5) "Board of health" means the board of health and
9 environmental sciences provided for in 2-15-2104.

10 (6) "Certificate" means the certificate of
11 environmental compatibility and public need issued by the
12 board under this chapter that is required for the
13 construction or operation of a facility.

14 (7) "Commence to construct" means:

15 (a) any clearing of land, excavation, construction, or
16 other action that would affect the environment of the site
17 or route of a facility but does not mean changes needed for
18 temporary use of sites or routes for nonutility purposes or
19 uses in securing geological data, including necessary
20 borings to ascertain foundation conditions;

21 (b) the fracturing of underground formations by any
22 means if such activity is related to the possible future
23 development of a gasification facility or a facility
24 employing geothermal resources but does not include the
25 gathering of geological data by boring of test holes or

1 other underground exploration, investigation, or
2 experimentation;

3 (c) the commencement of eminent domain proceedings
4 under Title 70, chapter 30, for land or rights-of-way upon
5 or over which a facility may be constructed;

6 (d) the relocation or upgrading of an existing
7 facility defined by (b) or (c) of subsection (10), including
8 upgrading to a design capacity covered by subsection
9 (10)(b), except that the term does not include normal
10 maintenance or repair of an existing facility.

11 (8) "Department" means the department of natural
12 resources and conservation provided for in Title 2, chapter
13 15, part 33.

14 (9) "Department of health" means the department of
15 health and environmental sciences provided for in Title 2,
16 chapter 15, part 21.

17 (10) "Facility" means:

18 (a) except for crude oil and natural gas refineries,
19 ~~and--facilities--and--associated--facilities--designed--for--or--~~
20 ~~capable--of--producing--gathering--processing--transmitting--~~
21 ~~transporting--or--distributing--crude--oil--or--natural--gas,~~ and
22 those facilities subject to The Montana Strip and
23 Underground Mine Reclamation Act, each plant, unit, or other
24 facility and associated facilities designed for or capable
25 of:

1 (i) generating 50 megawatts of electricity or more or
2 any addition thereto (except pollution control facilities
3 approved by the department of health and environmental
4 sciences added to an existing plant) having an estimated
5 cost in excess of \$10 million;

6 (ii) producing 25 million cubic feet or more of gas
7 derived from coal per day or any addition thereto having an
8 estimated cost in excess of \$10 million;

9 (iii) producing 25,000 barrels of liquid hydrocarbon
10 products per day or more or any addition thereto having an
11 estimated cost in excess of \$10 million;

12 (iv) enriching uranium minerals or any addition thereto
13 having an estimated cost in excess of \$10 million; or

14 (v) utilizing or converting 500,000 ~~tons~~ ^{tons} of coal per
15 year or more or any addition thereto having an estimated
16 cost in excess of \$10 million;

17 (b) each electric transmission line and associated
18 facilities of a design capacity of more than 69 kilovolts,
19 except that the term does not include an electric
20 transmission line and associated facilities of a design
21 capacity of 230 kilovolts or less and 10 miles or less in
22 length;

23 ~~(c)--each--pipeline--and--associated--facilities--designed~~
24 ~~for--or--capable--of--transporting--gas--(except--for--natural--gas)--~~
25 ~~water--or--liquid--hydrocarbon--products--from--or--to--a--facility~~

1 located--within--or--without--this--state--of--the--size--indicated
2 in-subsection-(10)(a)-of-this-section;

3 (d)(C) each pipeline, WHETHER PARTIALLY OR WHOLLY
4 WITHIN THE STATE, greater than 17 inches in diameter and 30
5 miles in length, and associated facilities;

6 (d)(e)(D) any use of geothermal resources, including
7 the use of underground space in existence or to be created,
8 for the creation, use, or conversion of energy, designed for
9 or capable of producing geothermally derived power
10 equivalent to 25 million Btu per hour or more or any
11 addition thereto having an estimated cost in excess of
12 \$750,000;

13 (e)(f)(E) any underground in situ gasification of
14 coal.

15 (11) "Person" means any individual, group, firm,
16 partnership, corporation, cooperative, association,
17 government subdivision, government agency, local government,
18 or other organization or entity.

19 (12) "Transmission substation" means any structure,
20 device, or equipment assemblage, commonly located and
21 designed for voltage regulation, circuit protection, or
22 switching necessary for the construction or operation of a
23 proposed transmission line.

24 (13) "Utility" means any person engaged in any aspect
25 of the production, storage, sale, delivery, or furnishing of

1 heat, electricity, gas, hydrocarbon products, or energy in
2 any form for ultimate public use."

3 Section-9--Section-75-20-216--MCA--is-amended-to-read:
4 "75-20-216--Study, evaluation, and report on--proposed
5 facility---assistance-by-other-agencies--(1)--After receipt
6 of--an--application, the department and department of health
7 shall within 90 days notify the applicant in writing--that:
8 (a)--the--application--is-in-compliance-and-is-accepted
9 as-complete, or

10 (b)--the--application-is-not-in-compliance-and-list--the
11 deficiencies---therein,---and---upon---correction--of--these
12 deficiencies--and--resubmission--by---the---applicant,---the
13 department--and--department--of--health--shall--within--30--days
14 notify--the--applicant--in--writing--that--the--application--is--in
15 compliance-and-is-accepted-as-complete.

16 (2)--Upon--receipt--of--an--application--complying-with
17 75-20-211--through--75-20-215,---and---this---section,---the
18 department--shall--commence--an--intensive--study--and--evaluation
19 of--the--proposed--facility--and--its--effects,--considering--all
20 applicable--criteria--listed--in--75-20-301--and--75-20-503--and
21 the--department--of--health--shall--commence--a--study--to--enable--it
22 or--the--board--of--health--to--issue--a--decision, opinion,--order,
23 certification,--or--permit--as--provided--in--subsection--(3)--The
24 department--and--department--of--health--shall--use,--to--the--extent
25 they--consider--applicable,--valid--and--useful--existing--studies

1 and--reports--submitted--by--the--applicant--or--compiled--by--a
 2 state--or--federal--agency;
 3 (3)--The--department--of--health--shall--within--1--year
 4 following--the--date--of--acceptance--of--an--application--and--the
 5 board--of--health--or--department--of--health,--if--applicable,
 6 within--an--additional--6--months--issue--any--decision,--opinion,
 7 order,--certification,--or--permit--required--under--the--laws
 8 administered--by--the--department--of--health--or--the--board--of
 9 health--and--this--chapter. The--department--of--health--and--the
 10 board--of--health--shall--determine--compliance--with--all
 11 standards,--permit--requirements,--and--implementation--plans
 12 under--their--jurisdiction--for--the--primary--and--reasonable
 13 alternate--locations--in--their--decision,--opinion,--order,
 14 certification,--or--permit. The--decision,--opinion,--order,
 15 certification,--or--permit,--with--or--without--conditions,--is
 16 conclusive--on--all--matters--that--the--department--of--health--and
 17 board--of--health--administer,--and--any--of--the--criteria
 18 specified--in--subsections--(2)--through--(7)--of--75-20-503--that
 19 are--a--part--of--the--determinations--made--under--the--laws
 20 administered--by--the--department--of--health--and--the--board--of
 21 health. Although--the--decision,--opinion,--order,
 22 certification,--or--permit--issued--under--this--subsection--is
 23 conclusive,--the--board--retains--authority--to--make--the
 24 determination--required--under--75-20-301(2)(c). The--decision,
 25 opinion,--order,--certification,--or--permit--of--the--department

1 of--health--or--the--board--of--health--satisfies--the--review
 2 requirements--by--those--agencies--and--shall--be--acceptable--in
 3 lieu--of--an--environmental--impact--statement--under--the--Montana
 4 Environmental--Policy--Act. A--copy--of--the--decision,--opinion,
 5 order,--certification,--or--permit--shall--be--served--upon--the
 6 department--and--the--board--and--shall--be--utilized--as--part--of
 7 their--final--site--selection--process. Prior--to--the--issuance--of
 8 a--preliminary--decision--by--the--department--of--health--and
 9 pursuant--to--rules--adopted--by--the--board--of--health,--the
 10 department--of--health--shall--provide--an--opportunity--for--public
 11 review--and--comment.
 12 (4)--Within--22--months--following--acceptance--of--an
 13 application--for--a--facility--as--defined--in--(a)--and--(d)(e) of
 14 75-20-104(10)--and--for--a--facility--as--defined--in--(b)--and--(c)
 15 through--(d) of--75-20-104(10)--which--is--more--than--30--miles--in
 16 length--and--within--1--year--for--a--facility--as--defined--in--(b)
 17 and--(c) through--(d) of--75-20-104(10)--which--is--30--miles--or
 18 less--in--length,--the--department--shall--make--a--report--to--the
 19 board--which--shall--contain--the--department's--studies,
 20 evaluations,--recommendations,--other--pertinent--documents
 21 resulting--from--its--study--and--evaluation,--and--an
 22 environmental--impact--statement--or--analysis--prepared--pursuant
 23 to--the--Montana--Environmental--Policy--Act,--if--any,--if--the
 24 application--is--for--a--combination--of--two--or--more--facilities,
 25 the--department--shall--make--its--report--to--the--board--within--the

greater--of--the--lengths--of--time--provided--for--in--this
subsection--for--either--of--the--facilities;

(5)--The--departments--of--highways;--commerce;--fish,
wildlife;--and--parks;--state--lands;--revenue;--and--public
service--regulation--shall--report--to--the--department
information--relating--to--the--impact--of--the--proposed--site--on
each--department's--area--of--expertise--The--report--may--include
opinions--as--to--the--advisability--of--granting--denying--or
modifying--the--certificate--The--department--shall--allocate
funds--obtained--from--filing--fees--to--the--departments--making
reports--to--reimburse--them--for--the--costs--of--compiling
information--and--issuing--the--required--report."

Section 9. Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date -- location -- department to
act as staff -- hearings to be held jointly. (1) Upon
receipt of the department's report submitted under
75-20-216, the board shall set a date for a hearing to begin
not more than 120 days after the receipt. Except-for-those
hearings-involving-applications-submitted-for-facilities--as
defined--in--(b)--and--(c)--of--75-20-104(10);--certification
Certification hearings shall be conducted by the board in
the county seat of Lewis and Clark County or the county in
which the facility or the greater portion thereof is to be
located.

(2) Except as provided in 75-20-221(2), the department

shall act as the staff for the board throughout the
decisionmaking process and the board may request the
department to present testimony or cross-examine witnesses
as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of
health and the board of health shall hold any required
permit hearings required under laws administered by those
agencies in conjunction with the board certification
hearing. In such a conjunctive hearing the time periods
established for reviewing an application and for issuing a
decision on certification of a proposed facility under this
chapter supersede the time periods specified in other laws
administered by the department of health and the board of
health."

Section 10. Section 75-20-303, MCA, is amended to
read:

"75-20-303. Opinion issued with decision -- contents.

(1) In rendering a decision on an application for a
certificate, the board shall issue an opinion stating its
reasons for the action taken.

(2) If the board has found that any regional or local
law or regulation which would be otherwise applicable is
unreasonably restrictive pursuant to 75-20-301(2)(f), it
shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include

1 the following:

2 (a) an environmental evaluation statement related to
3 the facility being certified. The statement shall include
4 but not be limited to analysis of the following information:

5 (i) the environmental impact of the proposed facility;

6 (ii) any adverse environmental effects which cannot be
7 avoided by issuance of the certificate;

8 (iii) problems and objections raised by other federal
9 and state agencies and interested groups;

10 (iv) alternatives to the proposed facility;

11 (v) a plan for monitoring environmental effects of the
12 proposed facility; and

13 (vi) a time limit as provided in subsection (4), during
14 which construction of the facility must be completed;

15 (b) a statement signed by the applicant showing
16 agreement to comply with the requirements of this chapter
17 and the conditions of the certificate.

18 (4) The board shall issue as part of the certificate
19 the following time limits during which construction of a
20 facility must be completed:

21 (a) For a facility as defined in (b) 1 or OR (c) 1 or
22 1d of 75-20-104(10) that is more than 30 miles in length,
23 the time limit is 10 years.

24 (b) For a facility as defined in (b) 1 or (c) 1 or 1d
25 of 75-20-104(10) that is 30 miles or less in length, the

1 time limit is 5 years.

2 (c) The time limit shall be extended for periods of 2
3 years each upon a showing by the applicant to the board that
4 a good faith effort is being undertaken to complete
5 construction. Under this subsection, a good faith effort to
6 complete construction includes the process of acquiring any
7 necessary state or federal permit or certificate for the
8 facility and the process of judicial review of any such
9 permit or certificate.

10 (5) The provisions of subsection (4) apply to any
11 facility for which a certificate has not been issued or for
12 which construction is yet to be commenced."

13 Section-12--Section--75-20-304--MCA--is--amended--to
14 read:

15 "75-20-304--Waiver---of---provisions---of---certification
16 proceedings--(1)--The-board-may-waive-compliance-with-any-of
17 the-provisions-of-75-20-216--through--75-20-222--75-20-501--
18 and--this-part-if-the-applicant-makes-a-clear-and-convincing
19 showing-to-the-board-at-a-public-hearing-that-an--immediate,
20 urgent-need-for-a-facility-exists-and-that-the-applicant-did
21 not--have--knowledge--that-the-need-for-the-facility-existed
22 sufficiently-in-advance-to-fully-comply-with-the--provisions
23 of-75-20-216-through-75-20-222--75-20-501--and-this-part--

24 (2)--The--board--may--waive--compliance-with-any-of-the
25 provisions-of-this-chapter--upon--receipt--of--notice--by--a

utility-or-person-subject-to-this-chapter-that-a-facility-or
 associated--facility--has--been--damaged--or--destroyed-as-a
 result-of-fire-flood-or-other-natural-disaster-or--as--the
 result-of--insurrection-war-or-other-civil-disorder-and
 there-exists-an-immediate-need-for--construction--of--a--new
 facility--or--associated--facility--or--the--relocation-of-a
 previously-existing-facility-or-associated-facility-in-order
 to-promote-the-public-welfare;

{3}--The--board--shall--waive--compliance--with--the
 requirements--of--subsections--(2)(c)-{3}(b)-and--(3)(c)-of
 75-20-301--and--75-20-501(5)--and--the--requirements--of
 subsections--(1)(a)(iv)--and--(v)-of--75-20-211, 75-20-216(3),
 and--75-20-303(3)(a)(iv)--relating--to--consideration--of
 alternative-sites--if--the--applicant--makes--a--clear--and
 convincing-showing-to-the-board-at-a-public-hearing-that;

{a}--a-proposed--facility--will--be--constructed--in--a
 county--where--a--single--employer--within--the--county--has
 permanently-terminated-or-ceased-operations-causing-a-loss-of
 250-or-more-permanent-jobs-within-2-years-at-the--employer's
 operations-within-the-preceding-10-year-period;

{b}--the-county-and-municipal-governing-bodies-in-whose
 jurisdiction--the-facility-is-proposed-to-be-located-support
 by-resolution-such-a-waiver;

{c}--the-proposed-facility-will-be-constructed-within-a
 15-mile-radius-of-the-operations-that-have--ceased--or--been

curtailed-and

{d}--the--proposed--facility--will--have--a--beneficial
 effect-on-the-economy-of-the-county-in-which-the-facility-is
 proposed-to-be-located;

{4}--The-waiver-provided-for-in-subsection--(3)--applies
 only--to--permanent--job--losses--by--a--single-employer--The
 waiver-provided-for-in-subsection--(3)--does-not-apply-to-jobs
 of-a-temporary-or-seasonal-nature-including-but-not-limited
 to-construction-jobs-or-job-losses-during--labor--disputes;

{5}--The-waiver-provided-for-in-subsection--(3)--does-not
 apply--to--consideration--of--alternatives-or-minimum-adverse
 environmental-impact-for-a-facility-defined--in--subsections
 (10)(b)-{c)-{d)-(e) or--(e) (f) of 75-20-104, for-an
 associated-facility-defined-in-subsection--(3)-of--75-20-104,
 or--for--any--portion-of-or-process-in-a-facility-defined-in
 subsection--(10)(a)-of--75-20-104--to--the--extent--that--the
 process--or--portion-of--the--facility--is-not-subject-to-a
 permit-issued-by--the--department--of--health--or--board--of
 health;

{6}--The--applicant--shall-pay-all-expenses-required-to
 process-and-conduct-a-hearing--on--a--waiver--request--under
 subsection--(3)-However--any--payments--made--under--this
 subsection-shall-be--credited--toward--the--fee--paid--under
 75-20-215--to--the--extent-the-data-or-evidence-presented-at
 the-hearing-or-the-decision-of-the--board--under--subsection

~~{3}--can--be--used--in--making--a--certification--decision--under
this--chapter--~~

~~{7}--The--board--may--grant--only--one--waiver--under
subsections--{3}--and--{4}--for--each--permanent--loss--of--jobs--as
defined--in--subsection--{3}{a}--"~~

Section 11. Section 75-20-1202, MCA, is amended to read:

"75-20-1202. Definitions. As used in this part and 75-20-201 through 75-20-203, the following definitions apply:

(1) (a) "Nuclear facility" means each plant, unit, or other facility designed for or capable of:

(i) generating 50 megawatts of electricity or more by means of nuclear fission;

(ii) converting, enriching, fabricating, or reprocessing uranium minerals or nuclear fuels; or

(iii) storing or disposing of radioactive wastes or materials from a nuclear facility.

(b) "Nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility", as defined in 75-20-104~~{7}~~(10), is further defined to include any nuclear facility as defined in subsection (1)(a) of this section."

NEW SECTION. Section 12. Water leasing program. (1)

There is a water leasing program administered by the department on behalf of the state of Montana.

(2) The department may acquire rights to water needed for leasing under this program through appropriation of water in its own name or by agreement with or purchase from another holder of water rights.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck Reservoir, if an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state is in effect;

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail Reservoirs if and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenues with the state from one or more of these reservoirs; and

(d) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or

1 a final decree under 85-2-234 has been entered; and
2 (ii) for which and for so long as there is an agreement
3 between the department and the federal government concerning
4 the acquisition of water and the sharing of revenues with
5 the state.
6 (4) Water may be leased for any beneficial use. The
7 amount of water that can be leased under this program for
8 all beneficial uses shall not exceed 50,000 acre-feet.
9 (5) The term of any lease may not exceed 50 years. A
10 term may be extended up to another 50 years if the
11 department again determines the desirability of leasing by
12 applying the considerations set forth in subsection (7). In
13 making such a redetermination, the department may require
14 the completion of an environmental impact statement in
15 accordance with subsection (6).
16 (6) The department shall require the completion of an
17 environmental impact statement under the provisions of Title
18 75, chapter 1, for lease applications that would result in
19 the consumption of 4,000 acre-feet a year or more and 5.5
20 cubic feet per second or more of water and for any other
21 application for which an environmental impact statement is
22 required by law. The department shall require the
23 completion of an environmental impact statement whenever the
24 cumulative effect of more than one application for a lease
25 would constitute a probable significant environmental

1 impact.
2 (7) Upon application by any person to lease water, the
3 department shall make an initial determination of whether it
4 is desirable for the department to lease water to the
5 applicant. Such a determination of desirability shall be
6 made solely on the following considerations:
7 (a) the content of the environmental impact statement,
8 if required;
9 (b) whether there is sufficient water available under
10 the water leasing program; and
11 (c) whether the criteria, except as to legislative
12 approval, set forth in 85-2-311 have been satisfied.
13 (8) The department shall for any agreement require
14 commercially reasonable terms and conditions, which may
15 include the requirement that up to 25% of the water to be
16 leased be made available to a potential user for any
17 beneficial use upon payment by such user of the costs of
18 tapping into and removing water from the applicant's
19 project. The department may differentiate in pricing,
20 depending on the proposed beneficial use of the water.
21 (9) The lease of water or the use of water under a
22 lease does not constitute a permit as provided in 85-2-102
23 and does not establish a right to appropriate water within
24 the meaning of Title 85, chapter 2, part 3.
25 (10) For purposes of the water leasing program

1 established in this section, it is the intent of the
2 legislature that the state act as a proprietor.

3 Section 13. Section 85-1-205, MCA, is amended to read:

4 "85-1-205. Acquisition of water in federal reservoirs.

5 ~~{1}~~ The department may acquire water or water storage by
6 purchase option or agreement with the federal government
7 from any federal reservoir for the purpose of sale, rent, or
8 distribution for ~~industrial-and-other--uses~~ any beneficial
9 use. In such cases, the department is not required to
10 construct any diversion or appropriation facilities or
11 works, and it may sell, rent, or distribute such water at
12 such rates and under such terms and conditions as it
13 considers appropriate, ~~except as provided in subsection {2}~~.

14 ~~{2}--Until--a--final--decree--has--been--issued--pursuant--to~~
15 ~~85-2-234--concerning--the--waters--in--a--federal--reservoir--the~~
16 ~~department--may--sell--rent--or--distribute--such--water--only~~
17 ~~after--a--permit--has--been--issued--to--an--applicant--for--purchase,~~
18 ~~rent--or--distribution--of--water--in--accordance--with--part--3--of~~
19 ~~this--chapter--"~~

20 Section 14. Section 85-2-316, MCA, is amended to read:

21 "85-2-316. Reservation of waters. (1) The state or any
22 political subdivision or agency thereof or the United States
23 or any agency thereof may apply to the board to reserve
24 waters for existing or future beneficial uses or to maintain
25 a minimum flow, level, or quality of water throughout the

1 year or at such periods or for such length of time as the
2 board designates.

3 (2) Water may be reserved only for existing or future
4 beneficial uses in the following river basins:

5 (a) the Clark Fork River and its tributaries to its
6 confluence with Lake Pend Oreille in Idaho;

7 (b) the Kootenai River and its tributaries to its
8 confluence with Kootenay Lake in British Columbia;

9 (c) the St. Mary River and its tributaries to its
10 confluence with the Oldman River in Alberta;

11 (d) the Little Missouri River and its tributaries to
12 its confluence with Lake Sakakawea in North Dakota;

13 (e) the Missouri River and its tributaries to its
14 confluence with the Yellowstone River in North Dakota; and

15 (f) the Yellowstone River to its confluence with the
16 Missouri River in North Dakota.

17 ~~{2}~~(3) Upon receiving an application, the department
18 shall proceed in accordance with 85-2-307 through 85-2-309.
19 After the hearing provided in 85-2-309, the board shall
20 decide whether to reserve the water for the applicant. The
21 department's costs of giving notice, holding the hearing,
22 conducting investigations, and making records incurred in
23 acting upon the application to reserve water, except the
24 cost of salaries of the department's personnel, shall be
25 paid by the applicant. In addition, a reasonable proportion

of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

~~3~~(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

~~a~~(i) the purpose of the reservation;

~~b~~(ii) the need for the reservation;

~~c~~(iii) the amount of water necessary for the purpose of the reservation;

~~d~~(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board

shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

~~4~~(5) If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

~~5~~(6) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or

1 river to a maximum of 50% of the average annual flow of
2 record on gauged streams. Ungauged streams can be allocated
3 at the discretion of the board.

4 ~~(6)~~(7) After the adoption of an order reserving
5 waters, the department may reject an application and refuse
6 a permit for the appropriation of reserved waters or may,
7 with the approval of the board, issue the permit subject to
8 such terms and conditions it considers necessary for the
9 protection of the objectives of the reservation.

10 ~~(7)~~(8) Any person desiring to use water reserved to a
11 conservation district for agricultural purposes shall make
12 application for such use with the district, and the district
13 upon approval of the application must inform the department
14 of the approved use. The department shall maintain records
15 of all uses of water reserved to conservation districts and
16 be responsible, when requested by the districts, for
17 rendering technical and administrative assistance within the
18 department's staffing and budgeting limitations in the
19 preparation and processing of such applications for the
20 conservation districts. The department shall, within its
21 staffing and budgeting limitations, complete any feasibility
22 study requested by the districts within 12 months of the
23 time the request was made. The board shall extend the time
24 allowed to develop a plan identifying projects for utilizing
25 a district's reservation so long as the conservation

1 district makes a good faith effort, within its staffing and
2 budget limitations, to develop a plan.

3 ~~(8)~~(9) A reservation under this section shall date
4 from the date the order reserving the water is adopted by
5 the board and shall not adversely affect any rights in
6 existence at that time.

7 ~~(9)~~(10) The board shall, periodically but at least once
8 every 10 years, review existing reservations to ensure that
9 the objectives of the reservation are being met. Where the
10 objectives of the reservation are not being met, the board
11 may extend, revoke, or modify the reservation.

12 ~~(10)~~(11) The board may modify an existing or future
13 order originally adopted to reserve water for the purpose of
14 maintaining minimum flow, level, or quality of water, so as
15 to reallocate such reservation or portion thereof to an
16 applicant who is a qualified reservant under this section.
17 Reallocation of reserved water may be made by the board
18 following notice and hearing wherein the board finds that
19 all or part of the reservation is not required for its
20 purpose and that the need for the reallocation has been
21 shown by the applicant to outweigh the need shown by the
22 original reservant. Reallocation of reserved water shall not
23 adversely affect the priority date of the reservation, and
24 the reservation shall retain its priority date despite
25 reallocation to a different entity for a different use. The

1 board may not reallocate water reserved under this section
2 on any stream or river more frequently than once every 5
3 years.

4 ~~†11†~~(12) Nothing in this section vests the board with
5 the authority to alter a water right that is not a
6 reservation.

7 (13) The department shall undertake a program to
8 educate the public, other state agencies, and political
9 subdivisions of the state as to the benefits of the
10 reservation process and the procedures to be followed to
11 secure the reservation of water. The department shall
12 provide technical assistance to other state agencies and
13 political subdivisions in applying for reservations under
14 this section.

15 (14) Water reserved under this section is not subject
16 to the state water leasing program established under
17 [section 14 12]."

18 NEW SECTION. Section 15. Reservations within Missouri
19 River basin. (1) The state or any agency or political
20 subdivision thereof or the United States or any agency
21 thereof that desires to apply for a reservation of water in
22 the Missouri River basin shall file a claim pursuant to
23 85-2-316 no later than July 1, 1987.

24 (2) The SUBJECT TO LEGISLATIVE APPROPRIATION, THE
25 department shall provide technical and financial assistance

1 to other state agencies and political subdivisions in
2 applying for reservations within the Missouri River basin.

3 (3) Before December 31, 1989, the board shall make a
4 final determination in accordance with 85-2-316 on all
5 applications filed before July 1, 1987, for reservations of
6 water in the Missouri River basin.

7 (4) Water reservations approved by the board under
8 this section have a priority date of July 1, 1985. The board
9 shall by order establish the relative priority of
10 applications approved under this section.

11 Section 16. Section 85-2-112, MCA, is amended to read:
12 "85-2-112. Department duties. The department shall:

13 (1) enforce and administer this chapter and rules
14 adopted by the board under 85-2-113, subject to the powers
15 and duties of the supreme court under 3-7-204;

16 (2) prescribe procedures, forms, and requirements for
17 applications, permits, certificates, claims of existing
18 rights, and proceedings under this chapter and prescribe the
19 information to be contained in any application, claim of
20 existing right, or other document to be filed with the
21 department under this chapter not inconsistent with the
22 requirements of this chapter;

23 (3) establish and keep in its Helena office a
24 centralized record system of all existing rights and a
25 public record of permits, certificates, claims of existing

rights, applications, and other documents filed in its office under this chapter;

(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system.

~~(4)~~(5) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

~~(5)~~(6) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing claims of existing rights with a district court under this chapter;

~~(6)~~(7) adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins as provided in 85-2-319."

Section 17. Section 85-1-203, MCA, is amended to read:

"85-1-203. State water plan. (1) The department shall gather from any source reliable information relating to Montana's water resources and prepare therefrom a continuing comprehensive inventory of the water resources of the state. In preparing this inventory, the department may conduct studies; adopt studies made by other competent water resource groups, including federal, regional, state, or private agencies; perform research or employ other competent agencies to perform research on a contract basis; and hold public hearings in affected areas at which all interested parties shall be given an opportunity to appear.

(2) The department shall formulate and, with the approval of the board, adopt and from time to time amend, extend, or add to a comprehensive, coordinated multiple-use water resources plan known as the "state water plan". The state water plan may be formulated and adopted in sections, these sections corresponding with hydrologic divisions of the state. The state water plan shall set out a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses. Before adoption of the state water plan or any section thereof, the department shall hold public hearings in the

state or in an area of the state encompassed by a section thereof if adoption of a section is proposed. Notice of the hearing or hearings shall be published for 2 consecutive weeks in a newspaper of general county circulation in each county encompassed by the proposed plan or section thereof at least 30 days prior to the hearing.

(3) The department shall submit to the water policy committee established in [section 21 19] and to each general session of the legislature the state water plan or any section thereof or amendments, additions, or revisions thereto which the department has formulated and adopted.

(4) The department shall prepare a continuing inventory of the groundwater resources of the state. The groundwater inventory shall be included in the comprehensive water resources inventory described in subsection (1) above but shall be a separate component thereof.

(5) The department shall publish the comprehensive inventory, the state water plan, the groundwater inventory, or any part of each, and the department may assess and collect a reasonable charge for these publications.

(6) In developing and revising the state water plan as provided in this section, the department shall consult with the water policy committee established in [section 21 19] and solicit the advice of the committee in carrying out its duties under this section."

Section 18. Section 85-1-621, MCA, is amended to read:

"85-1-621. Report to the legislature. The department shall prepare a biennial report to the legislature describing the status of the water development program. The report must describe ongoing projects and activities and those which have been completed during the biennium. The report must identify and rank in order of priority the projects for which the department desires to seek congressional authorization and funding and the efforts the department will undertake in attempting to secure such authorization and funding. The report must also describe proposed projects and activities for the coming biennium and recommendations for necessary appropriations. A copy of the report shall be submitted to the president of the senate and the speaker of the house, to the members of the water policy committee established in [section 21 19], and to such other members of the legislature as may request a copy."

NEW SECTION. Section 19. Water policy committee.

(1) There is a permanent water policy committee of the legislature. The committee consists of eight members. The senate committee on committees and the speaker of the house of representatives shall each appoint four members on a bipartisan basis. The committee shall elect its chairman and vice-chairman. The committee shall meet as often as necessary, including during the interim between sessions, to

1 perform the duties specified within this section.

2 (2) On a continuing basis, the committee shall:

3 (a) advise the legislature on the adequacy of the

4 state's water policy and of important state, regional,

5 national, and international developments which affect

6 Montana's water resources;

7 (b) oversee the policies and activities of the

8 department of natural resources and conservation, other

9 state executive agencies, and other state institutions, as

10 they affect the water resources of the state; and

11 (c) communicate with the public on matters of water

12 policy as well as the water resources of the state.

13 (3) On a regular basis, the committee shall:

14 (a) analyze and comment on the state water plan

15 required by 85-1-203, when filed by the department;

16 (b) analyze and comment on the report of the status of

17 the state's water development program required by 85-1-621,

18 when filed by the department;

19 (c) analyze and comment on water-related research

20 undertaken by any state agency, institution, college, or

21 university;

22 (d) analyze, verify, and comment on the adequacy of

23 and information contained in the water resources data

24 management system maintained by the department under

25 85-2-112; and

1 (e) report to the legislature, not less than once

2 every biennium.

3 (4) The environmental quality council shall provide

4 staff assistance to the committee. The committee may

5 contract with experts and consultants, in addition to

6 receiving assistance from the environmental quality council,

7 in carrying out its duties under this section.

8 Section 20. Section 85-2-122, MCA, is amended to read:

9 "85-2-122. Penalties. A person who violates or refuses

10 or neglects to comply with 85-2-301, 85-2-402, and

11 85-2-403, the provisions of this chapter, any order of the

12 department, or any rule of the board is guilty of a

13 misdemeanor."

14 NEW SECTION. Section 21. Extension of authority. Any

15 existing authority of the board and the department of

16 natural resources and conservation to make rules on the

17 subject of the provisions of this act is extended to the

18 provisions of this act.

19 Section 22. Section 7, Chapter 706, Laws of 1983, is

20 amended to read:

21 "Section 7. Termination date. This act Section 4 of

22 [this act] terminates July 1, 1985. The other sections do

23 not terminate and are permanent law."

24 NEW SECTION. Section 23. Repealer. Section 85-2-104,

25 MCA, is repealed.

1 NEW SECTION. Section 24. Codification instruction.
 2 Sections ~~147--177--and-21~~ 12, 15, AND 19 are intended to be
 3 codified as an integral part of Title 85, chapter 2, and the
 4 provisions of Title 85, chapter 2, apply to sections ~~147-177~~
 5 ~~and-21~~ 12, 15, AND 19.

6 NEW SECTION. Section 25. Severability. If a part of
 7 this act is invalid, all valid parts that are severable from
 8 the invalid part remain in effect. If a part of this act is
 9 invalid in one or more of its applications, the part remains
 10 in effect in all valid applications that are severable from
 11 the invalid applications.

12 NEW SECTION. Section 26. Applicability. This act
 13 applies to all permit applications, change in appropriation
 14 right applications, water sales and lease applications, and
 15 reservation applications filed and pending with the
 16 department on July 1, 1985, but upon which a hearing under
 17 Title 85, chapter 2, has not yet commenced.

18 NEW SECTION. Section 27. Effective date. This act is
 19 effective July 1, 1985.

-End-

STATUS SHEET

Natural Resources COMMITTEE

49th LEGISLATURE

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
HB670	TO REQUIRE RECLAMATION OF TAILING, WASTEROCK, AND ORE PROCESSING	5/3	IVERSON	3/20 3/28	BE CONCURRED IN	3/29
HB680	WATER POLICY REVISIONS	3/5	IVERSON	3/13 3/15 3/18 3/19	BE CONCURRED IN AS AMENDED	3/21
HB694	SPECIFYING PSC AVOID COST RATES FOR SMALL POWER PURCHASES BY UTILITIES	3/5	ASAY	3/11	TABLED	
HB638	TO REVISE LAW REGARDING SMALL MINER EXEMPTIONS	3/7	IVERSON	3/22 3/25	BE CONCURRED IN	3/25
HB750	GENERALLY REVISING MAJOR FACILITY SITING ACT	3/7	BARDANOUE	3/25 3/28	BE CONCURRED IN	3/29

MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 13, 1985

The nineteenth meeting of the Senate Natural Resources Committee was called to order at 1:05 p.m. by Chairman Dorothy Eck, Room 325, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present.

CONSIDERATION OF HB680: Representative Iverson, sponsor of HB680, stated the bill is the result of the directive of HB908 introduced in the 1983 legislature and took approximately one and one-half years to complete. The bill was originally intended to be a water marketing bill; however, the result is a water policy bill. Representative Iverson feels HB680 properly addresses the concerns of the people of Montana. HB680 addresses primarily the export ban of water, the coal slurry ban, the placement of certain pipelines under the Major Facility Siting Act, and the creation of a water leasing program. The export ban of water was repealed in the last session; however, this ban will expire in 1985. Representative Iverson feels the export ban should be permanently removed because it is unconstitutional. This decision is reaffirmed by two court cases, Sporhase v. Nebraska and El Paso v. Reynolds. These cases allow for state control of water for conservation purposes. Representative Iverson feels since the state cannot prohibit shipping water out of state, it should use public interest criteria. Representative Iverson explained HB680 provides for a trigger level of 4,000 acre feet and 5.5 cubic feet per second. Of the 8,000 water use permit applications filed since 1983, only 56 are above this level for nonconsumptive use. Representative Iverson feels this bill will offer the state of Montana some protection for its water. HB680 also recommends the coal slurry ban be removed. According to Representative Iverson, the coal slurry ban has not done Montana any good, since coal slurry can be accomplished without the use of water. Moreover, the coal slurry ban has not prevented water from being taken from the state and is in violation of the commerce clause and the equal protection clause of the State and U. S. Constitution. Representative Iverson stated the coal slurry ban neither protects water nor encourages coal development. HB680 also provides that pipelines more than 30 miles in length and 17 inches in diameter (inside diameter) shall fall under the Major Facility Siting Act.

Since large consumptive use is the biggest threat to Montana's water, HB680 also provides for a water leasing program. Representative Iverson feels since we cannot tell anyone they cannot use the state's water, the only alternative would be to lease water to anyone using over 4,000 acre feet and 5.5 cubic feet per second

for consumptive use. Lessees of Montana's water will be required to meet public interest criteria and comply with MEPA. The price for leasing water will be negotiable, and a person will not be able to lease water for more than 50 years. Representative Iverson stated because Montana will become a proprietor of leased water, it will be able to discriminate prices in favor of agricultural users. Representative Iverson stated there will eventually be a conflict regarding the use of water in the Missouri River Basin and, one day, Montana will have to defend its water in court. For this reason, he is recommending a water resource data managing system be started for the Missouri River Basin. Representative Iverson stated although reservations will be exempt from the leasing program, the public interest criteria will still apply.

HB680 will also require the Department of Natural Resources and Conservation (hereafter DNRC) to work quickly on reservation projects. DNRC will provide technical and financial assistance to those wishing to reserve water in the Missouri River Basin. July 1, 1987, is the deadline for anyone to apply for reservations of water in the Missouri River Basin. Representative Iverson explained the bill requires the DNRC to prepare a management plan for review by the legislature. HB680 will also establish a permanent water policy committee.

PROPOSERS: Mr. John Thorson, representing the Environmental Quality Council, went through the sections of HB680 explaining to the committee the provisions of water leasing, public interest, permit criteria, MEPA, definitions, reservation of water, penalties, rule-making authority, and the repeal of the coal slurry ban.

Senator Blaylock, who served on the interim committee, stated the committee had drawn up a good policy regarding the use and disposition of the state's water. Senator Blaylock supports HB680.

Mr. K. M. Kelly, representing the Montana Water Development Association, endorsed the testimony given by Representative Iverson.

Senator Shaw also served as a member of the interim committee and feels the policies presented in HB680 are in the direction the State of Montana should be going.

Representative Dorothy Bradley stated she, at one time, was a skeptic but now believes the committee has done an excellent job of dealing with people's concerns. Representative Bradley stated the House of Representatives was concerned mainly with the coal slurry ban and the reservation process. However, Representative Bradley feels the coal slurry statute is unconstitutional. She stated since we cannot use all of our water, we need to make a legitimate claim on water we want to use in the future, and HB680 responds to this need.

Mr. Larry Fasbender, representing DNRC, feels HB680 is an excellent piece of legislation. Mr. Fasbender stated he supports the amendments which Representative Iverson will be submitting to the committee. Mr. Fasbender urged the committee to work with the members of the interim committee if they find any problems with HB680. Mr. Fasbender recognizes the State of Montana is short of funds, but he feels this should not be a deterrent from making any long-range plans for our water.

Mr. David Lackman, representing the Montana Public Health Association, submitted written testimony (Exhibit 1) in favor of HB680.

Mr. Jim Flynn, representing the Montana Department of Fish, Wildlife and Parks, submitted written testimony (Exhibit 2) in favor of HB680.

Mr. Mons Teigen, representing the Montana Stockgrower's Association, submitted written testimony (Exhibit 3) in favor of HB680.

Mr. Terry Murphy, representing the Montana Farmers' Union, stated he supports the legislation because it will allow the State to make money by marketing surplus water. Mr. Murphy believes the revenue generated by marketing surplus water should be used to save water. Mr. Don Skaar, representing the Montana Chapter of the Sierra Club, believes HB680 is a step forward in helping Montana protect its resources. Mr. Skaar likes the water leasing provision of the bill, but he feels farmers, cities and recreation should be given priority on surplus water in Montana. Mr. Skaar stated the Montana Chapter of the Sierra Club supports HB680 only as a package. Mr. Skaar submitted written testimony (Exhibit 4).

Ms. Jo Brunner, representing Women Involved in Farm Economics, stated she believes in being prepared and supports HB680.

Mr. Don Reed, representing the Montana Environmental Information Center, submitted written testimony (Exhibit 5) in favor of HB680.

Mr. Russ Brown, representing the Northern Plains Resource Council, submitted written testimony (Exhibit 6) in favor of HB680.

Ms. Willa Hall, representing the League of Women Voters, submitted written testimony (Exhibit 7) in favor of HB680.

Mr. Pete Test, representing the Montana State Council of Trout Unlimited, stated water preservation is important to the members of this organization. Mr. Test feels preservation of

the Missouri River is important to Montana's economy. Mr. Test urged the committee for favorable consideration of HB680.

Mr. Dan Heinz, representing the Montana Wildlife Federation, stated he supports HB680 as a package.

Mr. James Mular, representing the United Transportation Union, stated he supports HB680, but he would like to see the bill amended since he is opposed to marketing Montana's water. Mr. Mular supports the amendments to be proposed by Mr. Jim Goetz (Exhibit 8). Mr. Mular questions whether there is a surplus of water in the state because the water is not all appropriated and decreed by the state water court. Mr. Mular feels the coal slurry ban is constitutional, since it has never been constitutionally challenged. Mr. Mular is convinced if the coal slurry ban is permanently repealed, it could jeopardize the jobs of 8,500 railroad workers. Mr. Mular is very concerned about these people.

OPPONENTS: Mr. James H. Goetz, representing the Brotherhood of Railway and Airline Clerks; International Association of Machinists and Aerospace Workers; the United Transportation Unions; the Brotherhood of Maintenance of Way Employees; and the Brotherhood of Locomotive Engineers, submitted written testimony (Exhibit 9) as an opponent to the parts of HB680 which repeal Montana's ban on coal slurry. Mr. Goetz also submitted a report he prepared on the constitutionality of Montana's prohibition of the use of water for coal slurry (Exhibit 10).

Mr. Bill Asher, representing the Agricultural Preservation Association of Gallatin County, testified as an opponent to HB680. Although Mr. Asher feels the interim committee on water marketing did a good job with a very complex issue, Mr. Asher also feels the water courts should be totally funded to adjudicate water. Mr. Asher suggested amending HB680 on page 40, lines 11 and 12, by striking "temporary preliminary decree, a preliminary decree under 85-2-231;." Mr. Asher feels by doing this, the committee will have addressed the water adjudication process.

Representative Bachini stated he would only support HB680 if it is amended and the coal slurry ban is left in. Representative Bachini was supported by Representative Mary Ellen Connelley, Representative Ray Peck and Representative Bob Raney.

Representative Ted Schye stated he supports HB680 only with the proposed amendment of Jim Goetz.

Mr. Vernon Westlake, representing the Agricultural Preservation Association, submitted written testimony (Exhibit 11) in opposition to HB680.

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Mr. Phil Rostad, representing Meagher County Preservation Association, submitted written testimony (Exhibit 12) in opposition to HB680.

Mr. Pat Underwood, representing Montana Farm Bureau Federation, submitted written testimony (Exhibit 13) in opposition to HB680.

Representative Brandewie, appearing as a private citizen, feels this piece of legislation should be held until Judge Lessley has completed his work in adjudicating water rights. Representative Brandewie is also concerned about what the coal slurry will do to railroad workers. Representative Brandewie feels the state may save in one area, but will pay a high price in other areas. He opposes coal slurry pipelines.

Representative Iverson closed the hearing on HB680 by submitting the Statement of Intent (Exhibit 14) and proposed amendments (Exhibit 15).

There being no further opponents, the hearing was opened to questions from the committee.

Senator Mohar questioned how much money was involved in the water policy program, and where this money would come from. Representative Iverson stated although there was no fiscal note, they are presently working on appropriations. Representative Iverson stated they would need some money to get the program started and for financing reservations.

Senator Shaw questioned whether the bill would have an impact on water development for irrigators or whether the bill would impact on the payback. Representative Iverson stated no to both questions.

Senator Fuller stated some witnesses expressed concern about the constitutionality problem with the coal slurry ban, and asked Mr. Doney to address this problem. Mr. Doney stated he feels the coal slurry ban is unconstitutional because it creates a burden on interstate commerce.

Mr. John Thorson, Environmental Quality Council, stated the constitutionality issue on HB680 has been addressed by many attorneys, and these attorneys are split in their decisions. Mr. Thorson stated there is an attorneys' fees consequence for losing this issue, and the prevailing party can collect attorneys' fees.

Senator Harding questioned how the water leasing program will affect Indian reservations. Representative Iverson answered it will not affect water on the reservations. Whether it will

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affect water after it leaves the reservation will be determined by the Water Compact Commission. Representative Iverson suspects the Compact Commission will make tribal waters subject to state laws once they leave the reservation.

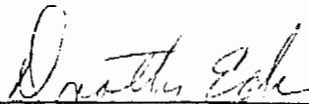
Senator Fuller questioned whether HB680 took into consideration the issue of federal eminent domain. Representative Iverson responded the issue was addressed in HB1010, which was killed in the House of Representatives.

Senator Gage stated the committee should take a look at the condition of the Indian people. Senator Gage feels the state might do well to recognize that Indians do own water.

Senator Weeding questioned whether the Major Facility Siting Act would afford any protection to the railroad workers' jobs. Representative Iverson answered it would not.

Chairman Eck wondered whether any of the coal being shipped from Montana was being shipped south. Mr. Doney replied there were no pipelines running south. Chairman Eck then questioned whether there were any coal slurry pipelines taking coal to the midwest. Mr. Doney replied there have been proposals to move coal to the midwest by pipelines.

There being no further questions from the committee, the meeting was adjourned at 2:57 p.m.



Senator Dorothy Eck, Chairman

ROLL CALL

Natural Resources

COMMITTEE

48th LEGISLATIVE SESSION -- 1985

Date 03/28/85

SENATE
SEAT

NAME	PRESENT	ABSENT	EXCUSED
ECK, Dorothy (Chairman)	✓		
HALLIGAN, Mike (Vice Chairman)	✓		
WHEELING, Cecil	✓		
MOHAR, John	✓		
DANIELS, M. K.	✓		
FULLER, David	✓		
CHRISTIAENS, Chris	✓		
TVEIT, Larry	✓		
GAGE, Delwyn	✓		
ANDERSON, John	✓		
SHAW, James	✓		
HARDING, Ethel	✓		

Each day attach to minutes.

(This sheet to be used by those testifying on a bill.)

NAME: DAVID LACKMAN

DATE: Mch 13, 1985 Wed.

ADDRESS: 1400 Winne Avenue, Helena, MT 59601

PHONE: 443-3494

REPRESENTING WHOM? Montana Public Health Association (Legislative Lobbyist)

APPEARING ON WHICH PROPOSAL: HB 680 (Iverson and others) Water Policy Revisions

Senate Natural Resources (Senator Dorothy Eck, Chmn.) Old Supreme Ct room. 1:00 P.M.

DO YOU: SUPPORT? XXX YES

AMEND?

OPPOSE?

Our category: Environment

COMMENT: We feel this legislation protects our ability to go after a stream-flow reservation; as we did in the case of the Yellowstone River. Although the specifics of 680 deal with the Missouri River Basin; the precedents established have far-reaching,

favorable implications. Fish, Wildlife & Parks is coming in for a stream reservation on

the upper Clark Fork (Warm Springs Creek to the Milltown Dam). Our over-riding purpose

is to preserve the quality of waters in the rivers and streams of Montana. Anyone

familiar with the lower Bitterroot River will agree that a reservation is also needed

for that river. P// Contrary to opponents, this legislation would not interfere

with the rights of agriculturalists to appropriate water. P// I have seen the fiscal

note - \$1,787,000. However, not all would come from the General Fund. Even though

full funding may not be available, we feel that precedents established have much

significance for the future. They provide solid guidelines for the most beneficial

uses of our precious water. P// The committee is to be commended on a job well done.

We urge your favorable consideration of this bill.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

I agree with Senator Matt Himsel that a surtax on income is a desirable method of raising additional revenue- we survived it once; and can do it again- but that is a subject for another day!

THANK YOU

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 1

DATE 031385

BILL NO. HB680

HB 680

Testimony Presented by Jim Flynn
Department of Fish, Wildlife and Parks

March 13, 1985

Mr. Chairman, members of the committee, I appear before you today in support of HB 680, a bill to maximize Montana's interest in the interstate allocation of water, to provide for water reservations in the Missouri River Basin, and amend criteria for water appropriation. Water has always been a critical commodity in the west, and the creation of a permanent Water Policy Committee, proposed by this bill, addresses the seriousness of this issue.

The concept of "water marketing" was introduced in the 1983 legislature. It was unfamiliar to many and left many questions unanswered. The Select Committee on Water Marketing investigated the water marketing issue in detail and recognized the need to address broader water policy concerns.

We have reviewed HB 680 and commend the Select Committee for its efforts. This bill is timely and comprehensive. It protects Montana's fair share of the Missouri River and provides safeguards for existing and future needs. It provides for accurate and timely adjudication which is needed to quantify existing use in the Basin. The timetable for the Missouri River water reservations will ensure that future consumptive and instream uses of water are quantified.

The fish and wildlife of the Missouri River Basin are nationally recognized. They are assured adequate consideration in this water reservation process as well as by the adoption of reasonable use criteria. The department supports HB 680 and would urge this committee to adopt the measure.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 2
DATE 03/13/85
BILL NO. HB680

WITNESS STATEMENT

Name Mons Teyen Senate Committee On Nat Resources
 Address Helena Date 3/13/85
 Representing Mont-Stanley Growers & Cowbellers Support X
 Bill No. H.B. 680 Oppose _____
 Amend _____

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. This bill is necessary to provide some strategy for the future use of the state's water.
2. Our organization supported a similar proposal in the 1983 session and believe the state's inability to pass that act resulted in a real lost opportunity.
- 3.

The letter of intent provides assurance as to the
 4. Legislature's intentions as far as agriculture's ^{continued} use of this vital resource.

BEST COPY AVAILABLE

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

WATER AVAILABILITY -- UPPER MISSOURI RIVER

Recently there have been serious concerns regarding the availability of water for new consumptive uses in the upper Missouri River Basin above Great Falls. These concerns are the result of several things:

1. Since 1977, the Montana Power Company has objected to applications for water use permits in the Missouri Basin upstream from Cochrane Dam at Great Falls. They claim a water right of 10,000 CFS and that no water is available for appropriation upstream unless Cochrane spills; which generally occurs only during spring runoff.
2. The Bureau of Reclamation objects to new water use above Canyon Ferry on the basis that all water originating upstream from Canyon Ferry Dam is necessary for filling the reservoir and generating hydropower. They claim new water users must obtain water from USBR through a contract rather than from DNRC with a water use permit.
3. The BLM claims a federal Reserved Right in the Wild and Scenic portion of the Missouri River. Some claim this right will severely curtail upstream water development.

What is the water availability situation in the upper Missouri Basin? Is the basin really closed to further water development? If so, why is there such concern for a water reservation and protecting instream flows above Canyon Ferry?

For many years, there was a water availability problem in the Upper Missouri Basin. Both MPC and USBR were objecting to all new applications for water use permits and the permits were held up in the administrative hearings process with no new permits being issued. This is no longer the case. In April 1984, DNRC issued the Canyon Ferry Water Right Order which discounted both MPC's and USBR's objections. This resulted in the bulk issuance of 170 water use permits totaling over 25,000 AF of water, with over 14,000 AF of that above Canyon Ferry. That order has been appealed; however, water use permits continue to be applied for and issued by DNRC.

The BLM claim for the Wild and Scenic reach is just that, a claim. It has not been negotiated with the Reserved Right Compact Commission. No compromises have been discussed, and it must be ratified by Congress or the Legislature. It is premature to judge what impact the BLM reserved right on the Wild and Scenic will have on upstream water availability.

In summary, water is still available for consumptive use in the upper Missouri Basin, and water permits are still being issued. They are issued, however, on a random, first come-first served basis and may affect existing users, future users and the river environment. There is strong support for reserving water for instream purposes as well as for future consumptive use through a well thought out planning and allocation process. The water reservation process will do just that.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 4

DATE 031385

BILL NO. H13680

Why is there considerable support this session for the water policy bill (HB 680) when there was so much opposition to "water marketing" last session?

The water marketing issue was first introduced in the 1983 legislature. It raised questions about the availability of excess water and the need for state control. In a semi-arid state, selling water to out-of-state users seemed foreign, and a common reaction was one of skepticism.

The original water marketing bills did not pass. Instead, an interim committee, the Select Committee on Water Marketing was formed to investigate the water marketing issue. During the past two years, the Select Committee not only studied water marketing but recognized the need to address the broader water policy concerns to insure adequate state control over water.

The recommendation of the Select Committee on Water Marketing (HB 680) have found considerable support for several reasons. The Committee was able to thoroughly research many of the issues which were left unresolved last session. Questions of unconstitutionality of existing laws and recent Supreme Court decisions were examined. Hearings were held to enable the public to voice their concerns and express their opinions.

The resulting recommendations and proposed legislation of the Select Committee provide substantial safeguards to insure future control of Montana's water and protect the interests of the people of Montana in the future. These safeguards include:

1. Accurate and timely adjudication of existing water rights is encouraged.
2. The water of the Missouri River Basin would be allocated for future consumptive and non-consumptive uses through the water reservation process.
3. An EIS would be required for all leases over 4,000 AF a year or 5.5 CFS and leases must satisfy a set of public interest criteria.
4. A maximum amount of 50,000 AF could be leased without legislative approval.
5. Water would be leased only from existing or future reservoirs and only from those basins which have issued a preliminary or final decree.
6. Reservation are exempted from the leasing program to avoid hardships on agricultural users.

The marketing of water is no longer the mystery it once was. The issues this session are much more clearly defined, and adequate safeguards have been built into the legislation to protect Montana's diverse interests. In addition, the strong water policy statement and reforms put Montana in a much better position to claim its fair share of the Missouri River's waters.

TESTIMONY IN SUPPORT OF HB 680

By Don Reed, Montana Environmental Information Center
March 13, 1985

Madame Chair and members of the Senate Natural Resource Committee, I'm Don Reed and I'm here on behalf of the members of the Montana Environmental Information Center in support of HB 680.

The Montana EIC has participated extensively in the interim committee's deliberations and endorses the package of recommendations in HB 680.

I would like to direct my comments to one little-discussed element of HB 680, placing pipelines under the Major Facility Siting Act. The Select Committee specifically requested comments on what pipelines to cover. We offer our comments here not to criticize the bill, but to let you know what we think is most appropriate.

Section 10 of HB 680 calls for placing all pipelines over seventeen inches in diameter and 30 miles in length under the Siting Act. The key strength of the provision is that it covers all lines regardless of what is transported in the line. This is crucial given the finding of the Select Committee that future coal slurry pipelines might not use water as the transportation medium. More likely candidates are carbon monoxide and methane. Limiting Siting Act coverage to lines which use water would not cover such coal slurry lines.

Second, the determination of which lines ought to be covered should revolve around the environmental impacts of the pipelines. Major pipelines crossing diverse terrain have environmental impacts similar to those found with large electrical transmission lines, which are currently covered by the Siting Act. Such "linear facilities" cross diverse terrain, streams, roads, and environmentally sensitive areas. Moreover, a large pipeline requires the building of a level earthen pad in construction. This has a significant environmental impact. The right-of-way is graded. This creates the potential for noxious weed infestations in the right-of-way and requires the separation of topsoil for reclamation.

According to the Department of Natural Resources and Conservation, pipelines sixteen inches in diameter and greater require the building of earthen pads. We believe that this is the most appropriate cutoff for which pipelines ought to be covered by the Siting Act. It is based on environmental impacts, not what is carried in the line.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 5
DATE 031385
BILL NO. HB680

Those who oppose placing pipelines under the Siting Act often argue that the process is too cumbersome and takes too long to permit a facility. Such arguments seemed to be based on the experience with power plants. The Siting Act also covers power transmission lines. Numerous powerlines have been permitted under the Siting Act.

An analysis of those power lines already covered by the Siting Act shows that some eighteen transmission lines have received Siting Act certificates. The average time between submission of a completed application and receiving the certificate has been fourteen and a half months. This shows that the Siting Act is capable of dealing with facilities similar to pipelines rather quickly.

We believe that experience shows that the regulation of pipelines under the Siting Act will not present an undue regulatory burden. The benefits of covering pipelines far outweigh those limited regulatory costs.

In summary, Montana EIC supports HB 680 in general, placing all pipelines regardless of contents under the Siting Act, and setting a size cutoff for pipelines that would cover pipelines sixteen inches in diameter and greater.

Thank you for this opportunity to comment.

cxh. b. t. s

PIPELINES UNDER THE MAJOR FACILITY SITING ACT

HB 680, SEC. 10

HB 680, recommended by the Select Committee on Water Marketing, Sec. 10 would place pipelines over 30 miles in length and seventeen inches in diameter under the Major Facility Siting Act (MFSA).

ENVIRONMENTAL IMPACTS

The environmental impacts of pipelines are similar to transmission lines, which are covered under the MFSA. Pipelines belong under the act. They can have significant environmental impacts when covering varied terrain. The disturbance of native ground cover in the right-of-way can cause problems with noxious weed invasion. There is also a need to separate topsoil from sub-surface soils for use in reclamation. Crossing diversified terrain causes problems with stream crossings and other "sensitive" areas (such as fragile alpine slopes, marginal vegetative cover, erosion-prone hillsides, etc.). Another major problem is the use of large volumes of water for hydro-static testing (which can dewater marginal streams and cause water pollution).

COMMITTEE RECOMMENDATIONS

The Select Committee recommends placing pipelines under the MFSA. The committee's recommendations are based on the need for adequate environmental review of possible coal slurry or water pipelines. Covering all types of pipelines is necessary for the statute to be constitutional, since pipelines of a similar environmental impact should not be regulated differently.

OPTIONS TO THE LEGISLATURE

1. Adopt current HB 680 language of seventeen inches and thirty miles.
2. Raise the diameter to twenty inches as supported by the oil and gas industry.
3. Lower the diameter to twelve or sixteen inches to cover all lines that require building an earthen pad for construction.
4. Base the cut off on something other than size.

RECOMMENDATIONS

* All lines that require the construction of level workpads should be covered by the MFSA. Such lines have significant environmental impacts since they require grading large right-of-ways (40 to 50 feet).

* Pipelines should be covered by the MFSA irrespective of the content of the line. Coverage of pipelines should be based on the environmental impacts, not the contents of the pipeline.

SUPPORT PLACING PIPELINES
UNDER THE MAJOR FACILITY SITING ACT

NORTHERN PLAINS RESOURCE COUNCIL

Field Office
Box 858
Helena, MT 59624
(406) 443-4965

Main Office
419 Stapleton Building
Billings, MT 59101
(406) 248-1154

Field Office
Box 886
Glendive, MT 59330
(406) 365-2525

TESTIMONY PRESENTED BEFORE THE
SENATE NATURAL RESOURCES COMMITTEE IN
SUPPORT OF HOUSE BILL 680 3-13-85

MADAM CHAIRWOMAN AND MEMBERS OF THE SENATE NATURAL RESOURCES COMMITTEE.
FOR THE RECORD, MY NAME IS RUSS BROWN AND I'M TESTIFYING ON BEHALF OF
THE NORTHERN PLAINS RESOURCE COUNCIL.

NORTHERN PLAINS IS A MONTANA, NON-PROFIT CITIZENS GROUP, WHOSE MEMBERSHIP
IS MOSTLY AGRICULTURALLY BASED.

MANY OF THESE MEMBERS, FROM DEER LODGE TO POWDER RIVER COUNTIES, ARE
WATER USERS WHOSE LIVELIHOODS ARE DEPENDENT ON THE RIVERS AND STREAMS
THAT FLOW THROUGH MONTANA.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE, NORTHERN PLAINS HAS FOLLOWED
AND SCRUTINIZED THE DEVELOPMENT AND EVOLUTION OF HOUSE BILL SINCE THE SELECT
COMMITTEE BEGAN MEETING AFTER THE 1983 LEGISLATIVE SESSION. WE HAVE
PARTICIPATED IN NUMEROUS MEETINGS AND HEARINGS AND HAVE SUBMITTED EXTENSIVE
TESTIMONY ON THIS BILL. AS A RESULT OF THIS PROCESS, WE HAVE CONCLUDED
THAT HOUSE BILL 680, AS A PACKAGE, IS AN EXCELLENT AND CRUCIAL PIECE OF
LEGISLATION.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE. THE BI-PARTISAN GROUP OF
LEGISLATORS THAT DEVELOPED THIS BILL (IN CONJUNCTION WITH THE ENVIRONMENTAL
QUALITY COUNCIL STAFF), WAS ENTITLED THE SELECT COMMITTEE ON WATER MARKETING.
HOWEVER, THE LEGISLATION THAT IS NOW BEFORE YOU IS NOT, I REPEAT NOT A
WATER MARKETING BILL, BUT A COMPREHENSIVE WATER POLICY BILL THAT IS WELL
DRAFTED AND VERY TIMELY.

MADAM CHAIRWOMAN AND MEMBERS OF THE COMMITTEE, NORTHERN PLAINS SUPPORTS
HOUSE BILL 680, AS A PACKAGE, AND WE'D LIKE TO STRESS THIS. WE URGE YOU
TO RESIST ANY AMENDMENTS THAT WOULD ALTER THE INTENT AND INTEGRITY OF THIS
CRUCIAL LEGISLATION. "THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 6
DATE 031385
HB680



League of Women Voters of Montana

Testimony in support of HB 680
Senate Natural Resource Com.

March 13, 1985

The League of Women Voters would like to commend the Select Committee on Water Marketing and the Environmental Quality Council for the extensive research completed during the past two years. The League attended nearly all of their meetings and reviewed the resource material provided.

We support HB 680, not because we are particularly enthused about marketing water, but because we see the importance of making some changes in our water policy and laws to give Montana greater capabilities in managing this vital resource. There are no easy, sure-fire answers to water management. However in light of recent federal court cases, this bill with all its components, is a fair compromise. Many of the provisions fit into the League's recently adopted water position.

The League is especially concerned about the protection of current water uses and minimum stream flows, as well as providing for future needs. Thus, we strongly support the completion of a reservation system on the Missouri river basin. Reservations will serve as an important tool in working cooperatively and effectively with other states in the basin and in the eventual allocation of the Missouri river between the basin states.

Equally important sections of this bill are the safeguards and criteria for issuing permits, use changes of large appropriations and the marketing of water. Since siting, construction and maintenance of pipelines can have a significant impact on the environment, we strongly support the section placing pipelines under the Major Facility Siting Act.

We support the establishment of a Water Policy Committee, the adoption of a State Water Plan and a water resources data management system as important methods for managing our water resources.

In conclusion, we wish to stress the importance of keeping all the components of this bill together. It is their inter-relationship that will give Montana the control and flexibility to properly manage the water in Montana for the benefit of its citizens.

Willa Hall
1502 Peosta
Helena, MT

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 7
DATE 03/13/85
BILL NO. HB680

Proposed Amendments to HB 680:

1. Page 1, lines 18-19
Strike: "REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY;"
 2. Page 1, line 24
Strike: "REPEALING SECTION 85-2-104, MCA;"
 3. Page 6, line 1
Following: "purpose"
Insert: ", other than for the mixture of water for coal slurry
pursuant to 85-2-104"
 4. Page 56, lines 24 and 25
Strike: section 23 in its entirety
- Renumber: subsequent sections

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 8
DATE 031385
BILL NO. HB680

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TO: Senate Natural Resources Committee
Montana Legislative Assembly

FROM: James H. Goetz

DATE: March 13, 1985

RE: House Bill 680, An Act Revising State Water Policy to Maximize Montana's Interests in the Interstate Allocation of Water; ...[and] repealing the ban on the use of water for coal slurry; etc.

FOR: Brotherhood of Railway and Airline Clerks; International Association of Machinists and Aerospace Workers; The United Transportation Unions; The Brotherhood of Maintenance of Way Employees; and the Brotherhood of Locomotive Engineers

COMMENTS: I testify on behalf of the organizations listed above in opposition to those parts of the bill which seek to repeal Montana's ban on coal slurry. Specifically, Section 323, page 56, of H.B. 680 would simply repeal M.C.A. Section 85-2-104, which provides as follows:

Slurry Transport of Coal (1) The Legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state.
(2) The use of water for the slurry transport of coal is not a beneficial use of water.

The rationale for repealing the coal slurry ban is not clear. It appears, however, that the select committee felt the constitutional validity of the coal slurry ban is a "close question" and the consequences of incorrectly relying on the ultimate defensibility of the ban are severe, including the possibility that water could be appropriated without significant payment to the State, the pipeline could be constructed outside any significant state regulations except for the Montana Environmental Policy Act, and the State could be liable for the prevailing party's attorney's fees. See p. 4, 10 "Report of the Select Committee on Water Marketing to the 49th Legislative Assembly, State of Montana, December , 1984."

I believe the Select Committee is wrong on all points. First, it is my opinion that the question is not particularly close. Even if it is, however, the consequences of being wrong are not necessarily severe, particularly if anticipatory mitigative steps are undertaken. For example, if the balance of H.B. 680 is passed, then the state

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position of having Montana waters appropriated without payment to the state, should the ban on coal slurry be found unconstitutional. Moreover, should such ban be found unconstitutional, it would appear that any coal slurry pipeline would fall within the ambit of the Montana Major Facilities Siting Act under the present amendments proposed in H.B. 680.

Further, generally speaking, a non-prevailing party is not required to pay the prevailing party's attorney's fees. While there are exceptions to the attorney's fees rule in cases where statutes specifically provide, it is doubtful that such exceptions would apply to a constitutional challenge to the Montana ban on coal slurry. Thus, the rationale of the Select Committee for eliminating the coal slurry ban is weak.

My most important point, however, is that the Select Committee is too cautious in its assessment of Montana's ability to defend the coal slurry ban. While there can be no guarantee that the Montana coal slurry ban would survive a constitutional challenge, Montana's chances of winning are strong. This is largely because the Montana ban is not discriminatory on its face--i.e., it applies to potential coal slurry which would be entirely intrastate, as well as interstate.

Thus, Montana's ban does not discriminate against interstate commerce. This aspect critically distinguishes the Montana ban from the Nebraska statute restricting the out-of-state sale of Nebraska ground water considered by the U.S. Supreme Court in Sporhase v. Nebraska, 458 U.S. 491 (1982). I have addressed that distinction at some length in a paper presented to the Select Committee on July 14, 1984 entitled "The Constitutionality of Montana's Prohibition of the Use of Water for Coal Slurry." I refer the Committee to that paper. The essential conclusion is that the Sporhase case dealt with a restrictive Nebraska ground water statute which explicitly discriminated against interstate commerce in that it forbade export of Nebraska ground water unless the state to which the water was to be exported reciprocally allowed the export of its ground water. The U.S. Supreme Court in the Sporhase case specifically focused on this reciprocity requirement and found it facially discriminatory. The Court said:

"The reciprocity requirement does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation, Huges v. Oklahoma..."

458 U.S. 958. Montana's ban, however, applies equally to in-state and out-of-state water use. Because of this feature, it is likely to survive a constitutional challenge. The United States Supreme Court has generally accorded states a wide latitude in natural resources cases in recent years except in cases where statutes have had explicit discriminatory features. See generally Commonwealth Edison Company v. Montana, 453 U.S. 609, 618 (1981). This is particularly true in the area of water use. See generally Sporhase, 458 U.S. at 956-957.

In sum, there appear to be no positive reasons advanced by the Select Committee for eliminating the coal slurry ban. Instead, the Select Committee has become too defensive based on a misapprehension of the constitutional vulnerability of the ban. Because the ban will likely survive constitutional challenge and because other less drastic actions may be taken to mitigate the difficulties should the ban not survive, the repealer should be deleted from the bill.

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JUN 11 1984

ENVIRONMENTAL
QUALITY COUNCIL

THE CONSTITUTIONALITY OF MONTANA'S PROHIBITION OF
THE USE OF WATER FOR COAL SLURRY

by

James H. Goetz

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 10

DATE 031385

REI NO

4B680

THE CONSTITUTIONALITY OF MONTANA'S PROHIBITION OF
THE USE OF WATER FOR COAL SLURRY

by James H. Goetz ^{*}/

Montana law prohibits the use of water for the purpose of coal slurry by declaring such use not to be a beneficial one.

M.C.A. Sec. 85-2-104 provides:

Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state. (2) The use of water for the slurry transport of coal is not a beneficial use of water. 1/

This means that an appropriator may not procure a water use permit for coal slurry purposes under Montana law.

The policy underlying the prohibition on the use of water for coal slurry is, as the statute reflects, one founded on conservation of the resource. The Montana Legislature has determined that coal slurry would be detrimental to Montana's vital interest in conservation of its scarce water supplies. There can be no doubt as to the importance of the interest of Montana in preservation of its water resource. On the other hand, with

1/ "'Slurry' means a mixture of water and insoluble material."
M.C.A. Sec. 85-2-102 (12)

^{*}/ James H. Goetz is a member of the firm Goetz, Madden & Dunn, P.C., Bozeman, Montana. He received a B.A. in History, Montana State University, 1965; J.D., Yale University, 1968. He is a lecturer in Political Science at Montana State University with course responsibilities in American Constitutional law and Environmental law. He argued Baldwin v. Montana Fish and Game Commission in the U.S. Supreme Court in 1978.

the sizable coal resources in Eastern Montana and with the need for economical transportation of the coal to market, it is arguable that the coal slurry ban unduly burdens interstate commerce in conflict with the U.S. Constitution. In fact, a case has been filed by the Yellowstone Pipeline Company which challenges a broad array of Montana (and Wyoming) environmental laws, including the coal slurry ban: Yellowstone River Pipeline Co., A Wyoming Corporation, v. Montana Department of Water Resources and Conservation, No. CV-83-86 BLG, U.S. District Court, Montana District, Billings Division. 2 /

THE COMMERCE CLAUSE

Among the most important of the powers delegated to the Central Government by the U.S. Constitution is the power of Congress to regulate interstate and foreign commerce. Art. I, Sec. 8, cl. 3 provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes" By its terms the Commerce Clause is an affirmative delegation of power to the Congress to regulate commerce. The clause, however, has traditionally played a dual role: it is a source of national power, and coupled with the Supremacy Clause (U.S. Const. Art. VI, Sec. 2), it is an inherent limitation on state power,

2 / The Yellowstone Pipeline Company case was at a very preliminary stage when, on plaintiff's request, a stay order was entered on December 7, 1983, pending final resolution of Intake Water Co. v. Yellowstone River Impact Commission, Civ. No. 1184. The Intake case, which was decided on Oct. 25, 1983, has been appealed. Accordingly it appears that there will be little action on the Yellowstone Pipeline case for some time.

commonly referred to as the "dormant" Commerce Clause power. ^{3/}

The U.S. Supreme Court recently put it this way:

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the State to enact laws imposing substantial burdens on such commerce . . .

South-Central Timber Development, Inc. v. Wunnicke, Comm'r,
Dep't. of Natural Resources of Alaska et al., ____ U.S. ____, 52
U.S.L.W. 4631 (May 22, 1984).

The purpose of the Commerce Clause was to promote commercial harmony among the states. As the Supreme Court has put it, the Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 375 (1979).

While the Commerce Clause serves as a limitation on the exercise of state power which burdens interstate commerce, it does not preclude all acts of the state simply because such acts result in some burden on interstate commerce. Some are allowed, some are not. The difficult question is, which are going to be tolerated, which precluded. An early case, Cooley v. Bd. of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851), attempted to reconcile the competing concerns, holding that states are free to regulate those aspects of interstate commerce so local in character as to demand diverse treatment, while Congress alone can regulate those aspects of interstate

^{3/} See generally Anson & Schenkkan, Federalism, The Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71 (1980).

commerce so national in character that a single, uniform rule is necessary. The Cooley text has proved vague. It is not easy to define those activities which are "local" in character and those which are "national."

The modern evolution of the Cooley text has been articulated by the Supreme Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1969), as the following:

[T]he general rule . . . can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with the lesser impact on interstate activities.

Again, the application of this text is not simple - it contemplates the weighing of the burden on interstate commerce against the putative local benefits of the legislation. For example, does the benefit to Montana resulting from the conservation of water by precluding coal slurry outweigh the effects on interstate commerce?

One thread running through many of the recent "dormant" Commerce Clause cases has to do with whether the statute is discriminatory. Ordinarily a state protectionist motive is disapproved. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). In the natural resources field the Supreme Court has recently invalidated a New Hampshire statute that prohibited a

corporation, which generated electricity by water power, from transmitting that energy out of state unless the New Hampshire Public Utilities Commission first approved. The Court observed, "Our cases consistently have held that the Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." New England Power Co. v. New Hampshire, 102 S. Ct. 1096, 1100 (1982). See also South-Central Timber Development, Inc. v. Wunnicke, Comm'r., Dep't. of Natural Resources of Alaska, et al. supra (holding violative of the "dormant" Commerce Clause an Alaska statute requiring that the "primary manufacture" (partial processing) of timber sold from Alaska state lands take place in Alaska).

Conversely, one of the reasons the Montana coal severance tax was found not to be in violation of the Commerce Clause was that it is not discriminatory - i.e. the tax applies equally to Montana coal consumed in Montana and that shipped out of state.

In general, the natural resources cases decided in recent years by the U.S. Supreme Court indicate that the states enjoy a wide latitude in enacting legislation unless the legislation is facially discriminatory. The Court's guidelines can be summarized as follows: (1) The regulation may not blatantly discriminate against non-residents; (2) the impact of the legislation on interstate commerce may not be severe; and (3) the regulation must be based on legitimate local purposes. See Goetz, Federalism and Natural Resources, Prologue, 43 Mont. L. Rev. 155 (Summer, 1982.)

THE SPORHASE CASE

In July of 1982 the U.S. Supreme Court decided Sporhase v. Nebraska, 458 U.S. 941 (1982), invalidating on Commerce Clause grounds a Nebraska statute restricting the out-of-state sale of Nebraska groundwater. The statute required any person intending to withdraw groundwater from any well located in the state and transport it for use in a different state, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources found that such withdrawal was reasonable, not contrary to the conservation and use of groundwater, and not otherwise detrimental to the public welfare, he would grant the permit, if the state in which the water was to be used granted reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska.

The Court rejected Nebraska's argument that water is not an article of commerce and hence not subject to the Commerce Clause. The Court then strictly scrutinized the Nebraska statute, notwithstanding the Court's recognition of the vital interests of the states, particularly the arid Western states, in conserving their water:

Because Colorado [the proposed destination state.] forbids the exportation of its ground water, the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Hughes v. Oklahoma, supra, at 336; Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

The reciprocity requirements fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and

preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement - when superimposed on the first three restrictions in the statute - significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Hughes v. Oklahoma, supra, at 337.

Id., at 957-958 (emphasis added).

One federal decision has followed Sporhase. In 1983 the U.S. District Court in New Mexico held unconstitutional New Mexico's prohibition on the out-of-state export of groundwater. City of El Paso v. Reynolds, et al., 563 F. Supp. 379 (D. N.M. 1983). The Court stated:

New Mexico's embargo bars the export of ground water absolutely; it is an explicit barrier to interstate commerce. Facially discriminatory, it is subject to

the strictest scrutiny. Defendants must demonstrate that the embargo serves a legitimate local purpose, that it is narrowly tailored to that purpose and that there are no adequate non-discriminatory alternatives. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The purpose defendants advance for New Mexico's overall system of ground water regulation is to conserve and preserve the state's internal water supply. They point to the state's long-standing water management laws, institutions, policies and public expenditures as evidence that the purpose is genuine.

Id. at 388-89 . The Court rejected New Mexico's purported justification, stating: "The policy of maximizing all 'public welfare' uses of water in New Mexico, and the furthering of that policy by prohibiting interstate commerce in groundwater, is tantamount to economic protectionism." Id. at 390 .

SPORHASE APPLIED TO THE MONTANA STATUTE

The pivotal aspect of the statute challenged in Sporhase was the facially-discriminatory reciprocity requirement. If the Montana ban on coal slurry applied only to out-of-state coal slurry, it would be subject to the "strictest scrutiny" and most likely would not survive. The saving feature of the Montana coal slurry ban, however, is the fact that it is not facially discriminatory - it bans coal slurry whether in-state or out-of-state. Accordingly, judicial review of the statute is likely to be more highly deferential.

Conceivably an attack could be made premised on the argument that, while the coal slurry ban is not facially discriminatory, it is de facto discriminatory because in fact virtually all of coal slurry originating in Montana would be destined for out-of-state. This argument would be dependent on facts that would

have to be developed. A similar argument, however, was not favorably received by the Supreme Court in the Montana coal severance tax case. There the Court refused to find that Montana's tax discriminates against interstate commerce even though 90 percent of the coal was shipped to other states under contracts that shift the tax burden to non-resident utilities, and therefore, to citizens of other states. In explanation, the Court observed:

The Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases.

Commonwealth Edison Co. v. Montana, 453 US 609, 618 (1981).

In the absence of a discriminatory feature the coal slurry ban is likely to pass constitutional muster. As noted above, the Court has generally accorded states a wide latitude in natural resources cases in recent years. Language in Sporhase indicates that the latitude may be even wider regarding water issues - areas in which the states have traditionally exercised a great deal of control.

In speaking of the state's interest in conservation and preservation of groundwater the Sporhase Court recognized the potency of the state's interest:

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems

from the "confluence of [several] realities." Hicklin v. Orbeck, 437 U.S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens - and not simply the health of its economy - is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See H.P. Hood & Sons v. Du Mond, 836 U.S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, e.g. Wyoming v. Colorado, 353 U.S. 953 (1957), but also by negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See Hicklin v. Orbeck, *supra*, at 533-534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 7-9. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See Reeves, Inc. v. Stake, 447 U.S. 429 (1980); cf. Philadelphia v. New Jersey, *supra*, at 627-628 and n. 6; Baldwin v. Fish and Game Comm'n, *supra*. A facial examination of the first three conditions set forth in Sec. 46-613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Id. at 956-57 (emphasis added). Thus, it appears that Sporhase would have been decided in favor of the State had it not been for

the facially discriminatory reciprocity provision. Since Montana's coal slurry law lacks the discriminatory feature and since its justification is found in the same principles as the Sporhase statute, conservation of scarce water resources, it probably would survive a Commerce Clause challenge. As the Sporhase Court observed:

Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.

Id. at 455-56.

In sum, "evenhandedness" of application is the key to survival of a constituted challenge. Montana's law appears to be evenhanded and will probably survive.

FUTURE FEDERAL ACTION

It is possible that Congress may attempt to take action to authorize use of water for coal slurry purposes. Since water is an article of commerce (Sporhase), Congress would probably have the constituted authority to enact such legislation under the Commerce Clause. In Sporhase, for example, the Court rejected Nebraska's argument that it "owned" the waters within the State and that its provisions dealing with State waters were beyond the reach of the Commerce Clause:

If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws. Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

Id. at 953-54. Thus if Congress enacted legislation

which directly authorized use of water for coal slurry, such legislation would probably preempt Montana's ban on slurry.

Under the rules of preemption, however, the conflict between the Federal and State Statutes must be irreconcilable.. The test is laid out by the U.S. Supreme Court in Pacific Gas & Electric Co. v. State Energy Resource Conservation & Dev. Comm'n., _____ U.S. _____, 75 L.Ed. 2d 752 (1983):

It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. . . . Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

75 L.Ed. 2d. at 765 (citations omitted). So far the Congress has considered and rejected legislation to provide federal eminent domain powers for the taking of land for coal slurry purposes. If such legislation passed it is doubtful that it would preempt Montana's coal slurry ban because the arguable conflict between the Federal and State laws would probably not be direct enough to warrant displacement of Montana's statute. The resolution of such conf

would ultimately depend on rules of statutory construction and the precise language of the Federal statute.

It is also possible that the Congress may legislatively consent to Montana's coal slurry ban, thereby immunizing it from Commerce Clause challenge. In South-Central Timber Development, Inc. v. Wunnicke, supra, the Supreme Court stated:

It is equally clear that Congress "may redefine the distribution of power over interested commerce" by "permit(ing) the states to regulate the commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

Such enabling legislation, however, must be clear. In Sporhase, Nebraska argued that Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water. It based its argument on 37 statutes in which Congress had deferred to state water law and on a number of interstate compacts dealing with water that had been approved by Congress. In rejecting Nebraska's argument the Court said:

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy" to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'"

458 U.S. at 959-60.

Thus, it is possible to remove any doubt about the constitutionality of the Montana coal slurry ban through clear authorizing legislation from Congress. The political feasibility of that solution is, however, questionable.

CONCLUSION

Montana's coal slurry ban is probably constitutional because the state retains a very strong police power interest in conservation of its water resource and because the statute applies evenhandedly. In light of the statute's constitutional defensibility, efforts to modify the statute are not advisable.

March 13, 1985

Senate Natural Resources Committee
Dorothy Eck, Chairman

Senator Eck and Members of the Committee:

For the Record, I am Vernon Westlake, chairman of the water committee for the Agricultural Preservation Associations. Again, for the Record, Gallatin A.P.A., Park County Legislative Association, and Meagher County Legislative Association oppose H.B. 680 with reservations. I should like to explain why these groups have taken a position with reservations.

We believe that Montana should be developing a water marketing policy and a plan for use of the unappropriated water in-state and out-of-state. We feel that H.B. 680 is not the answer and that it will create a similar situation with water marketing that S.B. 444 did with adjudication and recording of the existing water use twelve years ago. S.B. 444 gave the authority and responsibility to the DNRC to adjudicate and create a centralized record of the existing water use, as Section IX of the Montana Constitution required. I am sure that you are aware of the result; the word in the Legislature was that at the rate the DNRC was progressing, the process would take 50 years and would cost \$100,000,000. Let's not make this mistake again.

Our concern is that H.B. 680 gives too much authority to the DNRC, putting it in direct competition with all others for appropriation of surplus Montana water, including future agricultural needs. Not only that, but the jurisdiction of appropriation and adjudication of water could be taken out of the Court system and placed with the DNRC.

We are very concerned with Part A of the Recommendations to the 49th Legislature by the Select Water Marketing Committee. In our opinion, repealing "The Ban on Exportation of Water" at this time is premature, and Section 24 of H.B. 680 is not necessary.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 11

DATE 031385

421-80

We think that Montana should be very careful about using water for coal slurry. Our main concern is the possible effect of causing railroads an additional financial problem. This, in turn, could reflect in higher freight rates for transporting agricultural products to market. Our groups feel that existing statutes are adequate even though statements have been made to the contrary. Our position is best answered by asking this question: Why haven't export ban and water use for coal slurry been contested by the parties affected?

We also feel that changing the permit criteria from 10,000 acre-feet/year and 15 cubic feet/second to 4000 acre-feet/year and 5.5 cubic feet/second is not in the best interests of agriculture and especially for future in-state development of irrigated agriculture; 4000 acre-feet or 5.5 cubic feet/second is not a large water right. In terms of miners inches, 5.5 cubic feet/second is a flow of 220 miners inches, and I venture to say that the majority of water rights in Gallatin, Park and Meagher counties exceeds that amount.

We realize that the recommended change is addressing the unappropriated water in Montana, however, if this criteria is used to consider agricultural water right applications for the unappropriated water, it would, for all practical purposes, eliminate future development of irrigated agricultural land in Montana because the minimum is too small.

We would support coverage of pipelines under the Major Facility Siting Act, if and when, the pipelines were to be constructed. We believe that the general water adjudication process must be completed before any water pipeline construction should be permitted.

Part B of the Committee's Recommendations addresses the State Water Leasing Program. Our groups feel that this program is premature, and that no leasing should be permitted until the general water adjudication process is completed. I should like to include a very important

concept to consider in the future plan for water leasing.

Our groups are on record in support of the concept of Senator Story's S.B. 299. We recommend to the Committee that the DNRC should not have the authority to approve an application for either a permit or a temporary decree in the name of the Department for unappropriated water to sell or to lease. We believe that only the Court system should have jurisdiction for water appropriation. The DNRC should function only as an administrative agency for the State of Montana, regarding water use in-state or out-of-state.

Part C of the Committee's Recommendations, titled Maximizing Montana's Fair Share of the Missouri River Basin Water, is the part of the bill that our groups very strongly support. We are on record as having supported general stream adjudication for the past several sessions, but we believe that the language in the bill is not adequate.

We believe that general stream adjudication must be completed in all basins of Montana and preliminary decrees issued to all claimants before unappropriated water can be filed on for selling, leasing, irrigation, domestic, or other purposes, either intrastate or interstate use. We realize that this bill does provide that a basin is adjudicated before unappropriated water could be filed on. Our groups do not approve a piece-meal basin-to-basin approach for allocation of unappropriated water. We feel that completion of the adjudication process will provide a complete inventory of the existing water use and, in turn, give a real basis for a responsible water plan, thus enabling the development of a realistic water policy.

We believe that completion of the existing water use record will put Montana in a much stronger position, legally, than pushing for the immediate sale or lease of water for out-of-state use. Judge Lessley is predicting a completion of general stream adjudication within the

next five to six years, and we feel that the Water Courts will be able to accomplish the task in this period of time, and will issue preliminary decrees in all basins by 1990.

We support Section 13 of H.B. 680 only if stated as in Section 85-1-205 MCA in its entirety.

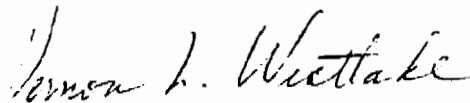
We question the need for new Section 15.

We support new Section 19, that there would be a permanent water policy committee of the Legislature.

We believe that former Senator Jean Turnage, now Chief Justice, was referring to these Sections in his letter to the Legislature. I quote: "Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set for an agenda of water issues that must be systematically addressed by the Legislature and citizens of the State in years to come."

I conclude by saying: Let's complete the general stream adjudication and then see how much unappropriated water we have for other uses, including sales, leases, and all other purposes. We should move with caution in the development of a policy for marketing Montana water. There is sufficient time and adequate legislation to satisfy Constitutional requirements for control of Montana water to the benefit of all Montana water users.

Thank you for this opportunity to present our position.



Vernon L. Westlake, chairman
Water Committee, Gallatin A.P.A.
3186 Love Lane
Bozeman, Mt. 59715

Mr. Chairman, members of the Committee....

I am Phil Rooted, representing the Meagher County Preservation Association.

I would object to the restriction from 10,000 A.F. and 15 Cu. Second to 4000 A.F. and 5.5 Cu. Second for in-state users. If the intent of the legislation is to preserve water for beneficial uses, the larger appropriation would better serve that end. Also, with the trend to fewer and larger agricultural entities the larger reservations would be in the best interests of the state of Montana.

I urge the restoration of the language in the original bill for in-state uses. My further concern is the sale of water in extremely dry years. If an out-of-state concern has a long term contract, whose right will have the prior consideration?

Remove amendment calling for 4000 ft. and 5.5 cu. ft. per second and leave as originally proposed the 10,000 AF and 15 cubic feet per second

P 10 Lines 5 and 6

P 11 Lines 10 through 15 be restored to the bill

P 20 lines 19 and 20

P 21 lines 20 and 21

P 23 lines 24 and 25

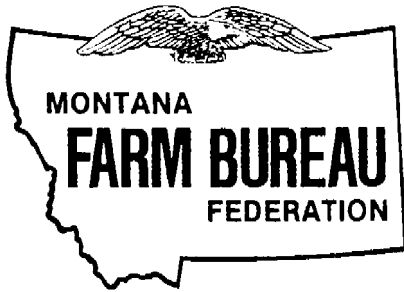
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SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 12

DATE 03/3/85

BILL NO. HB 680



502 South 19th

Bozeman, Montana 59715

Phone (406) 587-3153

TESTIMONY BY:

PAT VANDERWOOD

BILL #

HB 680

DATE

MAR 13, 1985

SUPPORT

OPPOSE

X

The MONTANA FARM BUREAU MUST
OPPOSE HB 680, JUST ON THE BASIS THAT
IT REMOVES THE BAN ON COAL SLURRY
PIPELINES. WE HAVE ALWAYS BEEN IN FAVOR
OF THIS BAN BOTH IN OUR STATE ORGANIZATION
AND OUR NATIONAL AMERICAN FARM BUREAU
ON THE NATIONAL SCENE.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 13

DATE 031385

BILL NO. HB680

[Signature]
SIGNED

FARMERS AND RANCHERS UNITED

MEMBERS OF THE COMMITTEE:

For the record, I am Jim Dargan, member of the Water Committee representing Park, Gallatin and Meagher Counties in the Agricultural Preservation Association. I have been involved in farming and ranching all my life, and am presently a partner in a farming and ranching operation south of Livingston, Montana. Water is the life blood of our operation, as it is for most of the farms and ranches in our valley. The implementation of the adjudication process as a result of S.B. 76 certainly emphasized the need to identify and document the many demands that are placed upon Montana's water. However, at the time of passage of this legislation everyone agreed that the primary goal - the most important task - was to begin the filing process that would eventually lead to a clear cut, logical distribution of water. Upon completion, water users across the state would have an up-to-date and valid filing on their water, based upon the final decision of the Water Court.

My fear is that H.B. 680 will not allow this adjudication process to reach its logical conclusion. Despite the assurances of the Select Committee, I find no specific reference to adjudication; nor any guarantee that the adjudication process will be completed and the needs of agricultural users be satisfied ahead of any sale to outside interests. I feel that the 49th Legislature should proceed very carefully on this matter. It has been said that here in Montana, "next to our children, water is our most precious resource". Let's not rush into this water marketing without knowing how much surplus water will be available. The directives in regard to policy making in H.B. 680 should be adhered to and given approval. However, the Legislature should hold the line on the appropriation and sale of water by the DNRC.

It should be noted in closing that several water basins in the state have been issued preliminary decrees by the Water Courts. In some instances, the water users were shocked and dismayed to find that their water rights had been reduced considerably. They would no longer have the volume of water available to irrigate their *crop* that has historically and traditionally been necessary to give adequate moisture for optimum growth. All this water which is no longer available to the user

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 14
DATE 03/389
BILL NO. HB 680

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AVAILABLE

be siphoned off into the "Unappropriated Water" category? Thus making it available for appropriation and sale by the DNRC. Shouldn't the individual who owns the decided water right have a share in the sale of said right if it is determined that there is excess water available? I feel that the Legislature is allowing a dangerous precedent to evolve which could set up a tremendous potential for abuse by the DNRC. Under H.B. 660 the traditional concept of "Prior Appropriation" is definitely weakened.

Finally, the change in consumptive use from 10,000 acre feet a year or 15 or more cfs down to 4,000 acre feet a year or 5.5 or more cfs of water is grossly unfair to the agricultural user. The original appropriations should be re-evaluated.

I submit these concerns for your consideration. I have no quarrel with the concept of marketing our water, provided the needs of Montana's water users are met and adequate provisions are made for future use. Only then should the marketing process be allowed to proceed.

Thank you,

James R. Dungan
James R. Dungan

Livingston, Mont.

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STATEMENT OF INTENT
HOUSE BILL 680
SENATE NATURAL RESOURCES COMMITTEE

A statement of intent is indicated for House Bill 680 because section 21 extends the authority of the board and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 and relating to the leasing of water under section 12.

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12, it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is further the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out-of-state. Provision for such incidental beneficial uses is authorized under section 12(8) of the bill.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 15
DATE 03/385
BILL NO. HB680

PAGE 2

STATEMENT OF INTENT HB 680

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low water year. All of the criteria listed in section 85-2-311, MCA, must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

PROPOSED AMENDMENTS TO HB 680
THIRD READING COPY

1. Page 8, line 20.
Following: "River"
Insert: "and its tributaries"
2. Page 20, lines 21 and 22.
Strike: "clear and convincing"
Insert: "substantial credible"
3. Page 26, line 5.
Following: "IN"
Insert: "inside"
4. Page 29, line 4.
Following "in"
Insert: "inside"
5. Page 44, line 15.
Following: "River"
Insert: "and its tributaries"

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 16
DATE 03/30/85
BILL NO. HB 680

DATE

3/13/85

COMMITTEE ON

Natural Resources Senate

1:00 P.M. ~~MT~~ Old Supreme
ET.

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
DAVID LACKMAN	MT Public Health Assn.	HB 680	X	
Jack Lamm	A PA	HB 680	X	X
Jack Lamm	A PA	HB 680		X
DON REED	MEIC	HB 680	r	
PAT UNDERWOOD	MONT. FARM BUREAU	HB 680		X
K.M. Kelly	MONT. WATER Develop. Assn.	HB 680	X	
Ted J. Davoy	Self	HB 680	X	
Russ Brand	Northern Plains Res. Council	HB 680	X	
Susan Cottrell	Sierra Club	HB 680	X	
Don Sleeter	Sierra Club	HB 680	X	
Don Heinz	Mont. Wildlife Federation	HB 680	X	
Timothy Mungin	Mont. Farmers Union	HB 680	X	
TELETEST	TROUT Unlimited	HB 680	X	
Phil ROSTAD	Albuquerque Pres. Assn.	HB 680		X
Richard J. Barber	A PA			X
Chet Linneman	A PA	HB 680		X
VERNON WESTLAKE	A PA	HB 680		X
BILL ASHER	APA, DCLA + MPA	HB 680		X
Rep. Bob Bachman	Self	HB 680		X
Calvin BARR JR.	BLE	HB 680	AMEND	X
Doc BRANN	SELF	HB 680	AMEND	X
Jim Miller	BRAC	HB 680	AMEND	
CARL KULTZMAN	BRAC	HB 680	AMEND	
Jim Goetz	BMW E BRAC BLE			
Moss T. Sisson	W. L. F. E.	HB 680	X	
W. L. F. E.		HB 680		

(Please leave prepared statement with Secretary)

SENATE AND HOUSE COMMITTEE

AB. 680

3/13/70

Incense

OPPOSE

Glasgow H.B. 180 Award

Sidney

He. be. a.

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PI FASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 15, 1985

The twentieth meeting of the Senate Natural Resources Committee was called to order at 1:05 p.m., by Chairman Dorothy Eck, March 15, 1985, Room 405, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present.

FURTHER CONSIDERATION AND ACTION ON HB680: Mr. John Thorson, of the Environmental Quality Council, submitted a proposed Statement of Intent (Exhibit 1) which was drafted by Mr. Ted Doney. This Statement of Intent spells out specifically that water may be preferentially priced for agricultural use in the state and attempts to set forth directions to the Department of Natural Resources and Conservation (hereafter DNRC) for water leasing.

Mr. Bob Thompson, staff researcher, reviewed amendments proposed by Representative Iverson (Exhibit 2). Senator Shaw moved these proposed amendments BE ADOPTED. The motion carried. Senator Shaw moved HB680 BE CONCURRED IN. Chairman Eck reminded Senator Shaw there were more proposed amendments which needed the committee's consideration. Senator Shaw withdrew his motion.

Mr. Thompson then explained the amendments proposed by Mr. Don MacIntyre, DNRC, would exempt Exxon's carbon dioxide pipeline from falling under the scope of the Major Facility Siting Act. Mr. Thorson explained further the proposed pipeline is pending before DNRC and should be exempt, since Exxon has already made application. Mr. Thorson feels Exxon will experience an undue hardship if it were required to reapply. Senator Christiaens moved the proposed amendment BE ADOPTED. The motion carried.

Senator Weeding moved amendments which strike references to removal of the ban on the use of water for coal slurry and strike section 23 (the repeal of the coal slurry ban) in its entirety (Exhibit 4) BE ADOPTED. Senator Shaw stated the ban on coal slurry is illegal and unconstitutional, and the interim committee was in agreement on this issue. Senator Shaw feels these amendments are proposed to protect the jobs of railroad workers and although Senator Shaw is sympathetic to their situation, he feels the committee should be concerned with the needs of the state. Senator Shaw then made a substitute motion that the proposed amendments (Exhibit 4) NOT BE ADOPTED. The motion failed by roll-call vote (Exhibit 5). The committee was in agreement this vote should be reversed to reflect that the proposed amendments BE ADOPTED.

Mr. James Goetz stated the constitutional arguments regarding the ban on coal slurry are not resolved. Senator Mohar stated

Minutes of the Meeting
March 15, 1985
Page 2

the ban could be defended on the water conservation issue; however, testimony did not concern water conservation but, rather, related to protection of jobs and economic protection. Senator Mohar feels the water conservation issue cannot be argued, since the record reflects economic protection as the issue.

Mr. Goetz feels water conservation can be argued since the courts will first look to the statutes and the coal slurry language contained therein, and then will look second to the legislative history behind the language. Mr. Goetz feels since the statutes reflect the ban as being a water conservation measure, the courts may not look at the legislative history at all.

Mr. Ted Doney stated that, in his opinion, the law is unconstitutional, but the issue will have to be decided in court. The interim committee looked at the statutes and decided they were questionable at at minimum. Mr. Doney does not understand how water will be conserved by prohibiting the use of water for coal slurry. Mr. Doney stated more water evaporates during one year than is used for coal slurry, and mine mouth generation will use more water in the long run.

Representative Iverson stated it has always been his contention this issue would have to be litigated to be resolved.

Mr. John Shontz, of Sidney, Montana, suggested referring this issue to persons who are knowledgeable about the issue and have no interest in the outcome.

Chairman Eck suggested the committee look at the report of the interim committee.

Senator Mohar moved HB680 BE CONCURRED IN. Senator Halligan made a substitute motion that the language "temporary preliminary decree, a preliminary decree under 85-2-231; or a" be stricken from page 40, lines 11-12, of HB680. The motion failed with only Senator Halligan voting in favor of the proposed amendment. Mr. Doney explained to the committee that since final decrees are dependent on a determination of Indian and federal water rights in the state of Montana, final decrees will not be available for another thirty years. Preliminary decrees will be available within five years. Representative Iverson stated he opposes this proposed amendment.

Senator Mohar moved HB680 BE CONCURRED IN AS AMENDED. The motion carried with Senator Halligan voting in opposition. Senator Mohar moved the Statement of Intent to HB680 BE ADOPTED. The motion carried.

Senator Gage questioned why the Statement of Intent allows agriculture to use water at a lower rate than industry. Senator Gage feels this is fine in light of the current economy; however, if the economy changes in the future, agriculture could be earning more income than industry. When asked by Chairman Eck if he would like to amend the Statement of Intent to reflect this concern, Senator Gage replied he did not.

There being no further questions or motions from the committee, the discussion of HB680 was closed.

CONSIDERATION OF HB860: Representative Dave Brown, sponsor of HB860, opened the hearing by stating he carried legislation in the 1983 session which set the groundwork for the Natural Heritage Program and the Natural Resource Information System. Representative Brown submitted written testimony (Exhibit 6) and a list of organizations which also support the Natural Heritage Program and Natural Resource Information System (Exhibit 7).

PROPOSERS: Written testimony was submitted by Gene Phillips, representing Pacific Power and Light (Exhibit 8); Mr. Donald M. Leuschen, The Montana Power Company (Exhibit 9); Mr. Mike Fitzgerald, Montana International Trade Commission (Exhibit 10); and Thomas Staples, Montana International Trade Commission (Exhibit 11) supporting the 1983 legislation.

Ms. Mary-Linda Kemp, representing the Northern Lights Institute, submitted written testimony (Exhibit 12) in favor of HB860.

Ms. Sara Parker, State Librarian, submitted written testimony (Exhibit 13) in favor of HB860.

Mr. Larry Weinberg, representing the Montana University System, is a proponent of HB860, because an analysis will give direction for faculty members.

Mr. Gary Langley, Executive Director of the Montana Mining Association, is a proponent of HB860 because it will help industry and the State identify sensitive areas.

Mr. George Ochenski, representing the Environmental Information Center, testified as a proponent of HB860.

Mr. T. M. Rollins, representing ASARCO, Inc., supports HB860 because it will enhance industry's ability to refer to data gathered by the natural resource information system.

ROLL CALL

Natural Resources

COMMITTEE

48th LEGISLATIVE SESSION -- 1985

Date 03/5/85

SENATE
SEAT

NAME	PRESENT	ABSENT	EXCUSED
<u>ECK, Dorothy (Chairman)</u>	✓		
<u>HALLIGAN, Mike (Vice Chairman)</u>	✓		
<u>WHEELING, Cecil</u>	✓		
<u>MOHAR, John</u>	✓		
<u>DANIELS, M. K.</u>	✓		
<u>FULLER, David</u>	✓		
<u>CHRISTIAENS, Chris</u>	✓		
<u>TVEIT, Larry</u>	✓		
<u>GAGE, Delwyn</u>	✓		
<u>ANDERSON, John</u>	✓		
<u>SHAW, James</u>	✓		
<u>HARDING, Ethel</u>	✓		

Each day attach to minutes.

STATEMENT OF INTENT
HOUSE BILL 680
SENATE NATURAL RESOURCES COMMITTEE

A statement of intent is indicated for House Bill 680 because section 21 extends the authority of the board and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 and relating to the leasing of water under section 12.

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12, it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is further the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out-of-state. Provision for such incidental beneficial uses is authorized under section 12(8) of the bill.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 1
DATE 03/5/85
HOLCA

PAGE 2

STATEMENT OF INTENT HB 680

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low water year. All of the criteria listed in section 85-2-311, MCA, must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

PROPOSED AMENDMENTS TO HB 680
THIRD READING COPY

1. Page 8, line 20.
Following: "River"
Insert: "and its tributaries"
2. Page 20, lines 21 and 22.
Strike: "clear and convincing"
Insert: "substantial credible"
3. Page 26, line 5.
Following: "IN"
Insert: "inside"
4. Page 29, line 4.
Following "in"
Insert: "inside"
5. Page 44, line 15.
Following: "River"
Insert: "and its tributaries"

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 2

DATE 03/5/85

BILL NO. HB 680

McIntyre amendments.

Proposed Amendments to HB 680
Third Reading Copy
March 15, 1985

1. Title, line 20
Following: "~~75-20-216~~"
Insert: "75-20-202,"

2. Page 33, following line 12
Insert: "Section 9. Section 75-20-202, MCA, is amended to read:
"75-20-202. Exemptions. (1) A certificate is not required
under this chapter for a facility under diligent onsite
physical construction or in operation on January 1, 1973.
(2) The board may adopt reasonable rules establishing
exemptions from this chapter for the relocation,
reconstruction, or upgrading of a facility that:
(a) would otherwise be covered by this chapter; and
(b) (i) is unlikely to have a significant environmental
impact by reason of length, size, location, available space or
right-of-way, or construction methods; or
(ii) utilizes coal, wood, biomass, grain, wind, or sun as a
fuel source and the technology of which will result in greater
efficiency, promote energy conservation, and promote greater
system reliability than the existing facility.
(3) This chapter does not apply to a facility defined in
75-20-104(10)(c) that has been designated by the governor for
environmental review by an executive agency of the state for
the purpose of complying with Title 75, chapter 1, pursuant to
Executive Order 4-81 and prior to [the effective date of this
act].""

Renumber: subsequent sections.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 3
DATE 03/15/85
BILL NO. HB 680

Proposed Amendments to HB 680:

1. Page 1, lines 18-19

Strike: "REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY;"

2. Page 1, line 24

Strike: "REPEALING SECTION 85-2-104, MCA;"

3. Page 6, line 1

Following: "purpose"

Insert: ", other than for the mixture of water for coal slurry
pursuant to 85-2-104"

4. Page 56, lines 24 and 25

Strike: section 23 in its entirety

Renumber: subsequent sections

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 4

DATE 03/5/85

HB 680

ROLL CALL VOTE

SENATE COMMITTEE Natural Resources

Date 031585 House Bill Bill No. 680 Time

NAME	YES	NO
ANDERSON, John	X	
CHRISTAENS, Chris	X	
DANIELS, M. K.	X	
FULLER, David		X
GAGE, Delwyn	X	
HALLIGAN, Mike (Vice Chairman)	X	
HARDING, Ethel	X	
MOHAR, John		X
SHAW, Jim		X
TVEIT, Larry		X
WEEDING, Cecil	X	
ECK, Dorothy (Chairman)	X	

Cynthia A. Peterson
Secretary

Dorothy Eck
Chairman

Motion: Senator Shaw's motion the amendments not be adopted.

Note: This vote is reversed to reflect the amendments were
adopted.

DATE 3-15

COMMITTEE ON NAT. RES.

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
GEORGE OCHENSKI	ENV. INF. CENTER	913/860	X	
K.M. Kelly	Mont. Water Develop. Assn. Mont. Irrigators, Inc.	913		X
Steve Gardner	State of Tennessee	860	X	
Mike Trevor	Dept. of Admin	860	X	
Jane Brown	Sponsoring Phil. H. Dir. 72	860 913	X	
Larry Weinberg	Mont. Univ. Sys.	860 913	X	
May Linda Kemp	Northern Lights Institute	860/913		
Phil Parnis	Roosevelt B.	915	X	
Jim Mockler	MT. Coal Council	860 913	X	
Ann Thompson	Montana Audubon Council	860 913	X	
Anna-Maria Sengmyer	MPRC	860/913	X	
Pat Wilson	Montana/Territorial Energy	860	X	
Tom Eberly	Nerco	860	X	
Janette Tallan	Mont. Alliance			
Gene Hutchinson	Governor's Office	913	X	
T.M. Collins	ASARCO, Inc.	860 913	X	
Sara Jenkins	House Dist. 13	913	X	
GARY A LANGLEY	MT. MINING ASSN	913/860	X	
Louise King	MT Low Income	913 Assn.	X	
Kurt Krueger	Representative HD 65	CO SPONSOR 913	X	
Mike Freeman	WETA	860/913	X	
Jack Dail	Butte Silver Box			X
Jack Dail	Butte-Silver Box - Andover Valley	913		X
Bob Marks	House	913	X	
Edward Stenstrom	Chevron Corporation	913	X	
Dianne Donnelly	Mont. Assoc. of Counties	913		
Dr. M. Douglas Scott	Institute Natural Resources MSU	913	X	
(Please leave prepared statement with Secretary)				

MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 18, 1985

The twenty-first meeting of the Senate Natural Resources Committee was called to order at 1:00 p.m. by Chairman Dorothy Eck, March 18, 1985, Room 405, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present.

CONSIDERATION OF HB702: Representative Harbin, sponsor of HB702, stated he is introducing HB702 on behalf of the Department of State Lands. Prior to 1981, the responsibility of managing state forest lands was with the Department of Natural Resources and Conservation (hereafter DNRC). In 1981, this responsibility was shifted to the Department of State Lands. However, some of Montana's statutes were never changed to reflect this shift of responsibility. HB702 simply changes these statutes to reflect this responsibility is now primarily with the Department of State Lands.

PROPOSERS: Mr. Dennis Hemmer, representing the Department of State Lands, submitted written testimony (Exhibit 1) in favor of HB702.

There being no further proponents and no opponents, the hearing was opened to questions from the committee.

Senator Shaw questioned whether HB702 will have a fiscal impact. Mr. Hemmer replied it would not.

There being no further questions from the committee, the hearing on HB702 was closed.

ACTION ON HB702: Senator Christiaens moved HB702 BE CONCURRED IN. The motion carried.

CONSIDERATION OF HB698: Representative Ream, sponsor of HB698, stated this bill is fairly simple, since the groups involved have worked out the bill ahead of time. Representative Ream explained HB698 provides for groundwater information to be provided with applications for operating permits, a commitment and plan to stabilize dams and dikes, and a mandamus section similar to the one contained in the Strip Mine Act. Section 5 also provides for replacement of damaged water supplies.

PROPOSERS: Mr. Dennis Hemmer, representing the Department of State Lands, submitted written testimony (Exhibit 2) in favor of HB698.

Minutes of the Meeting
March 18, 1985
Page 5

Senator Weeding had a problem with Section 4 and stated a lessee could be reimbursed for 100 percent when he is only entitled to 80 percent. Mr. Hemmer replied that what happens between the two lessees is of no consequence to the Department of State Lands.

There being no further questions from the committee, the hearing on HB705 was closed.

ACTION ON HB705: Senator Fuller moved HB705 BE CONCURRED IN. The motion carried.

ACTION ON HB769: Senator Shaw moved HB769 BE CONCURRED IN. The motion carried.

ACTION ON HB784: Senator Tveit moved HB784 BE CONCURRED IN. The motion carried.

FURTHER ACTION ON HB680: Senator Halligan moved the committee reconsider its action on HB680. Senator Halligan feels that HB680 is such an important bill that the committee should consider meeting to discuss this bill at length.

Chairman Eck stated she agreed and thought perhaps there was an amendment to the Statement of Intent which the committee should consider.

Senator Gage also agreed, stating he was also looking at some proposed amendments and would like to have the opportunity to speak with some people about issues which were not clearly brought out in the testimony given by the proponents and opponents.

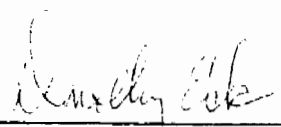
Senator Weeding agreed with Senator Halligan's motion because he feels the committee should consider the impact on the railroads.

Chairman Eck reminded the committee that by agreeing to reconsider HB680, the committee would not be striking any of the amendments previously adopted.

Senator Halligan's motion carried, with Senator Daniels voting in opposition.

FURTHER CONSIDERATION OF HB698: Senator Shaw stated Montana is in an economic crisis, and he does not want to see any more restrictions placed on the mining industry.

There being no further business to come before the committee, the meeting was adjourned at 2:25 p.m.



Senator Dorothy Eck, Chairman

ROLL CALL

Natural Resources

COMMITTEE

48th LEGISLATIVE SESSION -- 1985

Date 3/5/85

SENATE
SEAT
#

NAME	PRESENT	ABSENT	EXCUSED
<u>ECK, Dorothy (Chairman</u>	✓		
<u>HALLIGAN, Mike (Vice Chairman)</u>	✓		
<u>WHEEDING, Cecil</u>	✓		
<u>MOHAR, John</u>	✓		
<u>DANIELS, M. K.</u>	✓		
<u>FULLER, David</u>	✓		
<u>CHRISTIAENS, Chris</u>	✓		
<u>TVEIT, Larry</u>	✓		
<u>GAGE, Delwyn</u>	✓		
<u>ANDERSON, John</u>	✓		
<u>SHAW, James</u>	✓		
<u>HARDING, Ethel</u>	✓		

Each day attach to minutes.

MINUTES OF THE MEETING
SENATE NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE
March 19, 1985

The twenty-second meeting of the Senate Natural Resources Committee was called to order at 7:51 p.m. by Chairman Dorothy Eck, March 19, 1985, Room 405, State Capitol Building.

ROLL CALL: All members of the Senate Natural Resources Committee were present with the exceptions of Senator Fuller.

FURTHER CONSIDERATION OF HB680: Chairman Eck opened the meeting on HB680 by stating this is an executive session. Chairman Eck stated there are three sets of proposed amendments which need to be reviewed by the committee, including a proposed amendment to the Statement of Intent. Chairman Eck called the committee's attention to the amendments to HB680 already adopted by the committee (Exhibit 1). Chairman Eck reminded the committee members of her intent to not reopen the hearing for testimony and to keep questions to members of the audience specific.

Senator Shaw moved Senator Weeding's amendment retaining the ban on coal slurry, which was previously adopted by the committee, BE REJECTED (Exhibit 2).

Mr. Bob Thompson, staff researcher, stated this would simply involve reinserting the stricken language and striking the language inserted by No. 3 of the proposed amendments.

Senator Gage stated he had voted in favor of Senator Weeding's amendment for two reasons. The first reason was to speed up a determination by the courts on the coal slurry ban. This determination involves determining whether the use of water for coal slurry is beneficial, and whether it is a water conservation measure. Since this time, Senator Gage was informed there is a law which would allow the State of Montana to sue itself in a "friendly" suit to make this determination. Senator Gage feels this would be less costly to the State than an adversary lawsuit. The second reason concerned his fear that if coal slurry takes revenue from the railroads, the freight charges on other commodities shipped by the railroads would skyrocket. Senator Gage feels since water is now covered under interstate commerce, the economic concerns cannot be addressed by a coal slurry ban. Senator Gage stated he does not know whether the coal slurry ban is constitutional, and we will have to get a determination on this from the courts. Senator Gage stated that after speaking with Judge W. W. Lessley, State Water Judge, he does not think it is crucial that the coal slurry ban is in the bill.

Senator Weeding stated he has spoken with persons residing in his district and has discovered these people are concerned about marketing water, a substance so dear to the people of the state of Montana.

Mr. Don MacIntyre, representing the Department of Natural Resources and Conservation (hereafter DNRC) stated some of the factors in the decision-making process involve employment, social and economic effects.

Senator Halligan, referring to the handout from Representative Iverson on the constitutionality of the coal slurry ban (Exhibit 3) stated he needed more specifics on the issue.

Mr. John Thorson, Environmental Quality Council, stated the case of Sporhase v. Nebraska suggests there cannot be an absolute ban on the exportation of water. The coal slurry ban bans the exportation of coal slurry to another state, regardless of whether there is excess water available.

Senator Daniels feels the issue of the constitutionality of the coal slurry ban will have to be decided by the courts, but feels the real issue before the committee is whether to protect the railroad workers' jobs.

Senator Anderson questioned Mr. Thorson as to how the Sporhase v. Nebraska case affects the Montana State Constitution which states the water is the property of the State of Montana. Mr. Thorson replied this case was a blanket rejection that the states have control over the water, and the state Constitution is subject to federal law.

Senator Daniels feels that if the coal slurry ban is left in, freight rates will not escalate. Senator Daniels stated all the citizens of Montana will benefit from leasing state water if the money is placed in the general fund. Senator Daniels reminded the committee that it was evident from testimony at the hearing that if the state does not adopt a water policy, Montana could lose its water. The ban on coal slurry will eventually end up in court anyway, and in the meantime, Montana needs to adopt a water policy act in order to control its water.

Senator Harding questioned Representative Iverson as to whether railroad workers' jobs was given consideration by the interim committee. Representative Iverson stated this issue was given consideration; however, the most important concern of the committee was to adopt a water policy to protect Montana's water.

Representative Iverson stated the Sporhase case made it clear that economic protection is something the federal courts would not tolerate. If the coal slurry ban is left in, it could be construed as a protectionalist policy.

Upon question from Chairman Eck, Mr. Jim Molar stated he did have an opportunity to participate in the hearings conducted by the interim committee, and the railroad workers' jobs were not an issue.

Representative Iverson stated the interim committee attempted to reach a balance among all parties. The committee decided this kind of balance best protected the people of Montana. Representative Iverson feels Montana needs to have a policy which considers more than just a protection plan.

Upon question from Senator Harding as to whether the proposed amendment to the Statement of Intent (Exhibit 4) addresses this policy, Representative Iverson replied it did. Representative Iverson stated he is concerned about the railroad workers' jobs, but it is difficult to determine whether a coal slurry pipeline would affect these jobs.

Mr. James Mockler, Montana Coal Council, stated a pipeline which is only five miles within the border of Montana, but is ultimately over 1,000 miles long, would escape falling under the Major Facility Siting Act. Mr. Thompson explained this is incorrect, and the Major Facility Siting Act applies to the total length of the pipeline, not just the length of the pipeline to the Montana border. Mr. Thompson also explained that from his research, a pipeline with an inside diameter of less than 17" (which is needed to avoid the Major Facility Siting Act) would not be economically feasible.

Senator Weeding questioned Representative Iverson whether he had any indication of the probable course a pipeline from Montana would take. Representative Iverson stated a pipeline carrying coal would probably go to the midwest; however, not all pipelines leaving the state would be carrying coal. Representative Iverson feels it is a possibility a pipeline carrying water could go to the southwest.

Upon question from Senator Christiaens, Representative Iverson stated the 30-mile length for pipelines came from the DNRC. Although Representative Iverson was uncertain this was the proper length to use, he has not heard about any problems with it. Representative Iverson feels this length will cover as many pipelines as possible that carry water.

Senator Shaw's motion that Senator Weeding's amendment retaining the ban on coal slurry, which was previously adopted by the committee, BE REJECTED carried by roll-call vote (Exhibit 5).

Senator Weeding moved the proposed amendment to the Statement of Intent BE ADOPTED. The motion carried.

Mr. Don MacIntyre stated the board studies the impacts of major facilities on employment with or without this amendment to the Statement of Intent. The board requires the applicant and agencies to gather information on the proposed facility's economic and social effects. Mr. MacIntyre feels this amendment will strengthen the ability of the board and the DNRC to not only study these effects, but also to make well-informed decisions.

Senator Gage submitted proposed amendments (Exhibit 6) for the committee's consideration. Senator Gage feels as long as we are trying to protect Montana's water, we should also protect the water belonging to the Indians, since we may have to negotiate with them in the future. Senator Gage feels there are three parties involved in this issue: The Indians, the people of the state of Montana, and the downstream users. Upon question from Senator Christiaens, Senator Gage stated Montana will not be giving up anything by adopting this language.

Mr. John Thorson agreed with the amendments proposed by Senator Gage, stating they were a very good addition to the bill.

Mr. Bob Thompson suggested adding the word "requirements" after "including" in the first two amendments and changing "its boundaries" to read "the state's boundaries." The committee agreed with these proposed changes.

Senator Gage moved the amendments, as revised, BE ADOPTED. The motion carried.

Senator Shaw moved HB680 BE CONCURRED IN AS AMENDED. The motion carried with Senator Daniels voting in opposition.

Senator Halligan noted the bill provides for a lease of water for a term of 50 years and questioned why the 50-year time frame was used. Mr. Larry Fasbender, DNRC, stated it was felt anyone investing this much money in a project should be able to obtain a lease for up to 50 years.

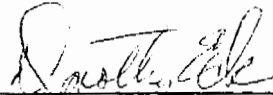
Chairman Eck assigned different aspects of the bill to committee members, so they would be prepared when HB680 is on second reading. Senator Christiaens will take the water leasing program; Senator

Minutes of the Meeting
March 19, 1985
Page 5

Shaw will address the ban on coal slurry; and, Senator Halligan will address the reservation process. Chairman Eck suggested the committee members spend some time with the staff of the Environmental Quality Council to become adequately prepared for their assignments.

The following Senators were appointed to the subcommittee to study HB913: Senator Mohar, Senator Gage and Chairman Eck. Chairman Eck encouraged any other members of the committee to attend.

There being no further business to come before the committee, the meeting was adjourned at 9:08 p.m.



Senator Dorothy Eck, Chairman

ROLL CALL

Natural Resources

COMMITTEE

48th LEGISLATIVE SESSION -- 1985

Date 03/19/85
7:30 p.m.

SENATE
SEAT
#

NAME	PRESENT	ABSENT	EXCUSED
<u>ECK, Dorothy (Chairman)</u>	✓		
<u>HALLIGAN, Mike (Vice Chairman)</u>	✓		
<u>WHEEDING, Cecil</u>	✓		
<u>MOHAR, John</u>	✓		
<u>DANIELS, M. K.</u>	✓		
<u>FULLER, David</u>			
<u>CHRISTIAENS, Chris</u>	✓		
<u>TVEIT, Larry</u>	✓		
<u>GAGE, Delwyn</u>	✓		
<u>ANDERSON, John</u>	✓		
<u>SHAW, James</u>	✓		
<u>HARDING, Ethel</u>	✓		

Each day attach to minutes.

Adopted

STATEMENT OF INTENT
HOUSE BILL 680
SENATE NATURAL RESOURCES COMMITTEE

A statement of intent is indicated for House Bill 680 because section 21 extends the authority of the board and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 and relating to the leasing of water under section 12.

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12, it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is further the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out-of-state. Provision for such incidental beneficial uses is authorized under section 12(8) of the bill.

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 1
DATE 031985
BILL NO. HB680

PAGE 2

STATEMENT OF INTENT HB 680

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low water year. All of the criteria listed in section 85-2-311, MCA, must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

PROPOSED AMENDMENTS TO HB 680
THIRD READING COPY

1. Page 8, line 20.
Following: "River"
Insert: "and its tributaries"
2. Page 20, lines 21 and 22.
Strike: "clear and convincing"
Insert: "substantial credible"
3. Page 26, line 5.
Following: "IN"
Insert: "inside"
4. Page 29, line 4.
Following "in"
Insert: "inside"
5. Page 44, line 15.
Following: "River"
Insert: "and its tributaries"

Proposed Amendments to HB 680
Third Reading Copy
March 15, 1985

1. Title, line 20

Following: "~~75-20-216,~~" :

Insert: "75-20-202,"

2. Page 33, following line 12

Insert: "Section 9. Section 75-20-202, MCA, is amended to read:

"75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1, 1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and

(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or

(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

(3) This chapter does not apply to a facility defined in 75-20-104(10)(c) that has been designated by the governor for environmental review by an executive agency of the state for the purpose of complying with Title 75, chapter 1, pursuant to Executive Order 4-81 and prior to [the effective date of this act]."

Renumber: subsequent sections.

Adopted (Sun Weeding)
REJECTED

Proposed Amendments to HB 680:

1. Page 1, lines 18-19

Strike: "REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY;"

2. Page 1, line 24

Strike: "REPEALING SECTION 85-2-104, MCA;"

3. Page 6, line 1

Following: "purpose"

Insert: ", other than for the mixture of water for coal slurry
pursuant to 85-2-104"

4. Page 56, lines 24 and 25

Strike: section 23 in its entirety

Renumber: subsequent sections

Adopted (~~by~~^{Sen} Weeding)
Rejected

Proposed Amendments to HB 680:

1. Page 1, lines 18-19

Strike: "REPEALING THE BAN ON THE USE OF WATER FOR COAL SLURRY;"

2. Page 1, line 24

Strike: "REPEALING SECTION 85-2-104, MCA;"

3. Page 6, line 1

Following: "purpose"

Insert: ", other than for the mixture of water for coal slurry
pursuant to 85-2-104"

4. Page 56, lines 24 and 25

Strike: section 23 in its entirety

Renumber: subsequent sections

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 2

DATE 031985

112100

March 19, 1985

TO: Members, Senate Natural Resources Committee

FROM: Rep. Dennis Iverson, Chairman, Select Committee on Water
Marketing *DS*

RE: Constitutionality of Coal Slurry Ban (MCA § 85-2-104)

On Monday your Committee voted to retain Montana's ban against the use of water for coal slurry purposes, MCA § 85-2-104. This action rejected a major conclusion unanimously reached by the Select Committee (chaired at the time by then-Sen. Jean Turnage) after 18 months of study. During that time, the Committee heard from 18 legal experts on this and other legal issues. Because of your Committee's willingness to reconsider the coal slurry ban issue, I want to summarize the basis for the Committee's recommendation:

I. Arguments in Favor of Retaining the Coal Slurry Ban

The chief proponents of retaining the coal slurry ban have been attorneys Jim Goetz and Karl Englund, both of whom were retained by the Select Committee to critically analyze the policy options facing the State. Goetz has made the following arguments supporting the constitutionality of the ban:

1. That the ban is a water conservation measure fulfilling the state constitutional requirement that "the Legislature shall prevent unreasonable depletion and degradation of natural resources." (Art. IX, § 1)

2. That such conservation measures are allowed under the U.S. Supreme Court's decision in Sporhase v. Nebraska (1982) because the Montana ban is not facially discriminatory (applies equally to intrastate, as well as interstate, pipelines) and does not unduly burden interstate commerce.

Mr. Goetz has since been retained by unions representing railroad workers to advance this position in order to preserve railroad jobs.

SENATE NATURAL RESOURCES COMMITTEE

EXHIBIT NO. 3

DATE 03/19/85

LRB:AM

Karl Englund, for his part, argued:

3. That the Sporhase case does not automatically apply because it concerned groundwater.
4. That the ban is part of an overall state policy of water conservation evidenced by constitutional and statutory provisions including the reservation, compact, and reservation processes. This policy should satisfy the criteria of the Sporhase case.

II. Arguments Against Retaining the Coal Slurry Ban

Other legal experts, many of whom specialize in water law throughout the West, took the position that Montana's coal slurry ban is unconstitutional or is certainly suspect. Al Stone, Professor of Law at the University of Montana, has concluded that the constitutionality of the ban "is a close question...too close to permit reliance on the statute." He argues:

1. That while the ban purports to be a conservation measure, it is only a "cosmetic touching up" of a prior, unconstitutional statute that barred only the interstate transport of coal by water.

The Select Committee heard from Professor Charles DuMars of the University of New Mexico School of Law. DuMars has particular expertise in this area because he served on a commission appointed by his governor to develop New Mexico's legislative response to similar issues raised in the El Paso v. Reynolds litigation. In addition to his general conclusion that the ban is unconstitutional, DuMars noted:

2. That the ban does not set forth any social, economic, and conservation reasons for imposing the ban.
3. That it is difficult to deny that coal slurry is a useful or beneficial use under the policy stated at MCA § 85-2-101(4): "It is further the policy of the state...to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purposes."

Steven Clyde is a partner in one of the foremost water law firms in the country (Clyde, Pratt, Gibbs & Cahoon of Salt Lake City). While his firm has been retained in the past by the ETSI pipeline firm, Clyde was retained by the Select Committee to give his independent opinion of Montana's ban. While also questioning the unconstitutionality of the ban, Clyde argued:

4. That, by their very nature, coal slurry pipelines involve interstate activity.

5. That Montana could serve its conservation purposes through means having less impact on interstate commerce.

Although not a witness before the Select Committee, Professor Dan Tarlock (who wrote the second most widely used water law case book in the United States with former Stanford Law School Dean Charles Meyers) has written about the Montana ban:

"Montana's special anti-slurry statute does not discriminate on its face against interstate commerce, but its discriminatory effect is clear and it will probably be treated as a per se export ban under Sporhase. The state will have trouble showing the compelling statewide need for the water that was required by the Court's opinion in Sporhase."

Your Senate Committee has also heard from Ted Doney, water attorney and former Director of DNRC, as to his opinion of the unconstitutionality of the ban.

III. Conclusions of the Select Committee

The Select Committee reached several other conclusions about the coal slurry ban:

1. That the ban fails either to protect Montana's jobs or to conserve its waters. All the ban does is to prevent the mixing of water and coal in the same pipeline. Water can still move out-of-state for other uses, and coal can move in a pipeline with a medium other than water.
2. That Montana's valid interests could be satisfied in other means and thus reduce the possibility of litigation.
3. That the state would be liable for the attorneys fees of the other side if it were unable to defend the ban (MCA § 85-2-125).

Thus, while recommending the removal of the ban, the Select Committee has constructed an elaborate means to protect both the economic and environmental interests of the State:

a. Water for virtually any coal slurry pipeline will have to be leased from the state. As a lessor, a state will have the ability to protect by the terms of the contract the important interests of the state and to require an appropriate payment for the water. Also, as a lessor, the state can differentiate in price and types of use.

b. In obtaining leased water, the applicant would have to satisfy the new public interest criteria, the provisions of the Major Facility Siting Act (which include economic effect), and MEPA.

Senate Natural Resources Committee

Page 4

c. In obtaining leased water for out-of-state use, the applicant would also have to satisfy special "out-of-state" public interest criteria which require an even more thorough scrutiny of the project.

In conclusion, members of the Select Committee believe that HB 680 provides carefully constructed protection for Montana's water and its economy. It does so constitutionally and does not invite costly and lengthy litigation.

Proposed Amendment to the Statement of Intent for HB680 (Third Reading
Copy)

March 18, 1985

1. Page 2, following the second (last) paragraph.

Add: "If an application for a slurry pipeline is received by the department of natural resources and conservation under the Montana Major Facility Siting Act, it is the intent of the legislature that the department and board of natural resources and conservation shall consider and document the potential adverse economic impacts, if any, on railroads and railroad employment as required by 75-20-301(3) and 75-20-503. The board shall also, to the extent feasible, require mitigation of these adverse impacts."

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 4
DATE 03/19/85
BILL NO. HB680

ROLL CALL VOTE

SENATE COMMITTEE Natural Resources

Date 031985 House _____ Bill No. 680 Time 8:42 p.m.

NAME	YES	NO
ANDERSON, John		X
CHRISTAENS, Chris		X
DANIELS, M. K.		X
FULLER, David	X	(proxy)
GAGE, Delwyn	X	
HALLIGAN, Mike (Vice Chairman)	X	
HARDING, Ethel	X	
MOHAR, John		
SHAW, Jim	X	
TVEIT, Larry	X	
WEEDING, Cecil		X
ECK, Dorothy (Chairman)	X	

Annithia C. Peterson
Secretary

Dorothy Eck
Chairman

Motion: Senator Shaw moved the committee reject the amendments
regarding the ban on coal slurry previously adopted.

6-11-85
Proposed Amendments to HB 680
Third Reading Copy
March 19, 1985

1. Page 11, line 19.
Following: "requirements"
Insert: ", including ^{requirements}for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within ~~its~~ ^{the state's} boundaries."
2. Page 22, line 7.
Following: "requirements"
Insert: ", including ^{requirements}for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within ~~its~~ ^{the state's} boundaries."
3. Page 49, line 22.
Strike: "a claim"
Insert: "an application"

SENATE NATURAL RESOURCES COMMITTEE
EXHIBIT NO. 6
DATE 031985
BILL NO. HB680

STANDING COMMITTEE REPORT

SENATE

MARCH 21 19 85

MR. PRESIDENT

We, your committee on NATURAL RESOURCES

having had under consideration HOUSE BILL No. 680

THIRD reading copy (BLUE color)
(BLAYLOCK)

WATER POLICY REVISIONS

Respectfully report as follows: That HOUSE BILL No. 680

be amended as follows:

1. Title, line 20.
Following: "75-20-216,"
Insert: "75-20-202,"

2. Page 8, line 20.
Following: "River"
Insert: "and its tributaries"

3. Page 11, line 19.
Following: "requirements"
Insert: ", including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries"

4. Page 20, lines 21 and 22.
Following: "by" on line 21
Strike: "clear and convincing"
Insert: "substantial credible"

00XKAS6

00XKXKAS6X

Page 1 of 3

SENATOR DOROTHY ECK

Chairman.

MARCH 21 19 85

5. Page 22, line 7.
Following: "requirements"
Insert: ", including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries"

6. Page 26, line 5.
Following: "IN"
Insert: "inside"

7. Page 29, line 4.
Following: "in"
Insert: "inside"

8. Page 33, line 13.
Following: line 12
Insert: "Section 9. Section 75-20-202, MCA, is amended to read:

"75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1, 1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and
(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or
(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

(3) This chapter does not apply to a facility defined in 75-20-104 (10) (c) that has been designated by the governor for environmental review by an executive agency of the state for the purpose of complying with Title 75, chapter 1, pursuant to Executive Order 4-81 and prior to [the effective date of this act]."

Renumber: subsequent sections

Page 2 of 3

SENATOR DOROTHY ECK

MARCH 21 1985

STATEMENT OF INTENT
HOUSE BILL 680
SENATE NATURAL RESOURCES COMMITTEE

9. Page 44, line 15.
Following: "River"
Insert: "and its tributaries"

10. Page 49, line 22.
Following: "file"
Strike: "a claim"
Insert: "an application"

Mr. President,

We, your committee on Natural Resources having had under consideration House Bill 680, attach the following statement of intent:

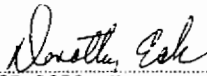
A statement of intent is needed for House Bill 680 because section 21 extends the authority of the board and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 and relating to the leasing of water under section 12.

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12, it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is

13
AND, AS AMENDED
BE CONCURRED IN

STATEMENT OF INTENT
ADOPTED AND ATTACHED
Page 3 of 3


SENATOR DOROTHY ECK Chairman

contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is also the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out-of-state. Provision for such incidental beneficial uses is authorized under section 12(8) of the bill.

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low water year. All of the criteria listed in 85-2-311 must be applied and considered by the department before it decides to enter into a lease of water..

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

If an application for a slurry pipeline is received by the department of natural resources and conservation under the

Montana Major Facility Siting Act, it is the intent of the legislature that the department and board of natural resources and conservation shall consider and document the potential adverse economic impacts, if any, on railroads and railroad employment as required by 75-20-301(3) and 75-20-503. The board shall also, to the extent feasible, require mitigation of these adverse impacts.

1.2

COMMITTEE OF THE WHOLE AMENDMENT

SENATE

Mar 26, 1985

DATE

1:25

TIME

MR. CHAIRMAN: I MOVE TO AMEND HOUSE BILL No. 680

third reading copy (blue) as follows:
Color

1. Page 6, line 1.

Following: "department"

Insert: ", with the approval of the board,"

2. Page 22, line 3.

Strike: "a public hearing"

Insert: "one or more public hearings"

3. Page 22, line 18.

Following: "after"

Strike: "a public hearing"

Insert: "one or more public hearings"

4. Page 24, line 2.

Following: "hold"

Strike: "a hearing"

Insert: "one or more hearings"

5. Page 24, lines 4 and 5.

Following: "hold" on line 4

Strike: "a hearing"

Insert: "one or more hearings"

6. Page 40, line 3.

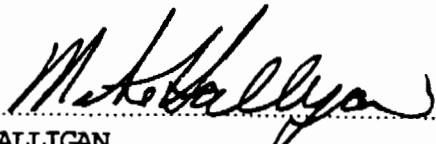
Following: "Montana."

Insert: "Water leases issued under this program must be approved by the board."

PC3HB680.651

ADOPT

REJECT


HALLIGAN

1 STATEMENT OF INTENT

2 HOUSE BILL 680

3 Senate Natural Resources Committee

4
5 A statement of intent is needed for House Bill 680
6 because section 21 extends the authority of the board and
7 the department of natural resources and conservation to
8 adopt rules relating to the provisions of the bill. Such
9 extension of authority would include the authority to adopt
10 rules relating to the implementation of water reservations
11 on the Missouri River basin under section 15 and relating to
12 the leasing of water under section 12.

13 In their implementation of this bill, the long-range
14 goal of the board and the department must be to conserve and
15 protect the water resources of Montana for the use of all
16 Montanans. Since agricultural uses of water constitute the
17 largest uses by far, and a healthy economy of the state
18 depends upon agriculture, the agricultural uses of water in
19 Montana must be particularly conserved and protected.

20 In developing rules implementing this bill, and in
21 entering into lease agreements with potential water users
22 under section 12, it is the intent of the legislature that
23 the department establish leasing rates which are
24 commercially reasonable and take into account the financial
25 abilities of a particular sector of the economy to lease

1 water at various rates. Accordingly, it is contemplated
2 that leasing rates for agricultural uses of water will be
3 considerably lower than rates for industrial uses, as an
4 example.

5 It is also the intent of the legislature that water be
6 made available through the leasing program at minimal cost
7 to potential users who may wish to benefit from a water use
8 project of a third party. An example would be an irrigation
9 district or a municipality in Montana that may desire to tap
10 into a pipeline conveying water out of state. Provision for
11 such incidental beneficial uses is authorized under section
12 12(8) of the bill.

13 In entering into a lease of water, the department shall
14 include a provision in the lease that other existing or
15 planned uses of water in Montana will be fully protected
16 during a low-water year. All of the criteria listed in
17 85-2-311 must be applied and considered by the department
18 before it decides to enter into a lease of water.

19 In the implementation of water reservations in the
20 Missouri River basin, it is the intent of the legislature
21 that applicants for agricultural reservations be given equal
22 treatment and opportunity to reserve water as that afforded
23 applicants for instream uses. To the extent possible, equal
24 treatment and opportunity includes the provision of
25 financial resources and technical assistance to such

1 applicants.

2 If an application for a slurry pipeline is received by
3 the department of natural resources and conservation under
4 the Montana Major Facility Siting Act, it is the intent of
5 the legislature that the department and board of natural
6 resources and conservation shall consider and document the
7 potential adverse economic impacts, if any, on railroads and
8 railroad employment as required by 75-20-301(3) and
9 75-20-503. The board shall also, to the extent feasible,
10 require mitigation of these adverse impacts.

HOUSE BILL NO. 680

INTRODUCED BY IVERSON, BLAYLOCK, HARP, SHAW,
ASAY, CODY, HOLLIDAY, HARPER, MARKS, NEUMAN,

ABRAMS, D. BROWN, VAN VALKENBURG, KADAS,

VINCENT, DONALDSON, NATHE, BRADLEY,

POFF, TVEIT, E. SMITH, BARDANOUVE

BY REQUEST OF THE SELECT COMMITTEE ON WATER MARKETING

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE WATER
POLICY TO MAXIMIZE MONTANA'S INTERESTS IN THE INTERSTATE
ALLOCATION OF WATER; AMENDING CRITERIA FOR WATER
APPROPRIATION AND CHANGES IN APPROPRIATION; PROVIDING FOR A
LIMITED WATER LEASING PROGRAM; EXEMPTING WATER RESERVATIONS
FROM THE LEASING PROGRAM; PLACING CERTAIN PIPELINES UNDER
THE MONTANA MAJOR FACILITY SITING ACT; PROVIDING FOR WATER
RESERVATIONS IN THE MISSOURI RIVER BASIN; ESTABLISHING A
WATER RESOURCES DATA MANAGEMENT SYSTEM; CREATING A PERMANENT
WATER POLICY COMMITTEE; REPEALING THE BAN ON THE USE OF
WATER FOR COAL SLURRY; AMENDING SECTIONS 75-20-104,
~~75-20-216~~, 75-20-202, 75-20-218, 75-20-303, ~~75-20-304~~,
75-20-1202, 85-1-203 THROUGH 85-1-205, 85-1-621, 85-2-102,
85-2-112, 85-2-122, 85-2-124, 85-2-301, 85-2-311, 85-2-312,
85-2-316, 85-2-402, MCA, AND SECTION 7, CHAPTER 706, LAWS OF
1983; REPEALING SECTION 85-2-104, MCA; AND PROVIDING AN
EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, the Select Committee on Water Marketing was
commissioned by the 1983 Legislature to undertake a study of
the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study
determined that Montana needs to address broader questions
of water policy in order to secure Montana's interests in
allocation and management of state waters; and

WHEREAS, the Select Committee has presented a
comprehensive package of recommendations that must be
considered as a whole; and

WHEREAS, these recommendations serve to revise
Montana's water policy in order to maximize Montana's
authority over management of state waters and other natural
resources and to conserve water for existing and future
beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana
finds that this legislation and other recommendations of the
Select Committee on Water Marketing constitute an
appropriate revision of state water policy necessary to
secure Montana's interests for present and future benefit to
Montanans.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

1 "85-2-102. Definitions. Unless the context requires
2 otherwise, in this chapter the following definitions apply:

3 (1) "Appropriate" means to divert, impound, or
4 withdraw (including by stock for stock water) a quantity of
5 water or, in the case of a public agency, to reserve water
6 in accordance with 85-2-316.

7 (2) "Beneficial use", unless otherwise provided,
8 means:

9 (a) a use of water for the benefit of the
10 appropriator, other persons, or the public, including but
11 not limited to agricultural (including stock water),
12 domestic, fish and wildlife, industrial, irrigation, mining,
13 municipal, power, and recreational uses; and

14 (b) a use of water appropriated by the department for
15 the state water leasing program under (section 14 12 13) and
16 of water leased under a valid lease issued by the department
17 under (section 14 12 13).

18 (3) "Board" means the board of natural resources and
19 conservation provided for in 2-15-3302.

20 (4) "Certificate" means a certificate of water right
21 issued by the department.

22 (5) "Change in appropriation right" means a change in
23 the place of diversion, the place of use, the purpose of
24 use, or the place of storage.

25 (5)(6) "Declaration" means the declaration of an

1 existing right filed with the department under section 8,
2 Chapter 452, Laws of 1973.

3 (6)(7) "Department" means the department of natural
4 resources and conservation provided for in Title 2, chapter
5 15, part 33.

6 (7)(8) "Existing right" means a right to the use of
7 water which would be protected under the law as it existed
8 prior to July 1, 1973.

9 (8)(9) "Groundwater" means any water beneath the land
10 surface or beneath the bed of a stream, lake, reservoir, or
11 other body of surface water, and which is not a part of that
12 surface water.

13 (9)(10) "Permit" means the permit to appropriate issued
14 by the department under 85-2-301 through 85-2-303 and
15 85-2-306 through 85-2-314.

16 (10)(11) "Person" means an individual, association,
17 partnership, corporation, state agency, political
18 subdivision, the United States or any agency thereof, or any
19 other entity.

20 (11)(12) "Political subdivision" means any county,
21 incorporated city or town, public corporation, or district
22 created pursuant to state law or other public body of the
23 state empowered to appropriate water but not a private
24 corporation, association, or group.

25 (12)-"Slurry"--means--a--mixture-of-water-and-insoluble

1 ~~material.~~

2 (13) "Waste" means the unreasonable loss of water
3 through the design or negligent operation of an
4 appropriation or water distribution facility or the
5 application of water to anything but a beneficial use.

6 (14) "Water" means all water of the state, surface and
7 subsurface, regardless of its character or manner of
8 occurrence, including but not limited to geothermal water,
9 diffuse surface water, and sewage effluent.

10 (15) "Water division" means a drainage basin as defined
11 in 3-7-102.

12 (16) "Water judge" means a judge as provided for in
13 Title 3, chapter 7.

14 (17) "Water master" means a master as provided for in
15 Title 3, chapter 7.

16 (18) "Well" means any artificial opening or excavation
17 in the ground, however made, by which groundwater is sought
18 or can be obtained or through which it flows under natural
19 pressures or is artificially withdrawn."

20 Section 2. Section 85-1-204, MCA, is amended to read:

21 "85-1-204. Department powers over state waters. (1)
22 The department, with the approval of the board, may sell,
23 lease, and otherwise dispose of all waters which may be
24 impounded under this chapter, and the water may be sold for
25 the purpose of irrigation, development of power, watering of

1 stock, or any other purpose. The department, WITH THE
2 APPROVAL OF THE BOARD, may also lease water under the state
3 water leasing program established under the provisions of
4 [section 14 12 13]. To the extent that it may be necessary
5 to carry out this chapter and subject to a compliance with
6 the other provisions of this chapter, the department has
7 full control of all the water of the state not under the
8 exclusive control of the United States and not vested in
9 private ownership, and it shall take such steps as may be
10 necessary to appropriate and conserve the same for the use
11 of the people. The authority of the department conferred by
12 this chapter extends and applies to rights to the natural
13 flow of the waters of this state which it may acquire, with
14 the approval of the board, by condemnation, purchase,
15 exchange, appropriation, or agreement.

16 (2) For the purpose of regulating the diversion of
17 those waters, the department may enter upon the means and
18 place of use of all appropriators for making surveys of
19 respective rights and seasonal needs.

20 (3) The department may take into consideration the
21 decrees of the courts of this state having jurisdiction
22 which purport to adjudicate the waters of a stream or its
23 tributaries, and a fair, reasonable, and equitable
24 reconciliation shall be made between the claimants asserting
25 rights under different decrees and between decreed rights

1 and asserted rights of appropriation not adjudicated by any
2 court.

3 (4) The department, at its discretion, may hold
4 hearings relating to the rights of respective claimants
5 after first giving such notice as it considers appropriate
6 and make findings of the date and quantity of appropriation
7 and use of all claimants which the department will recognize
8 and observe in diverting the waters which it owns. The
9 department may police and distribute to the owner of the
10 recognized appropriation the waters due him upon request and
11 under terms agreed upon.

12 (5) The department, when engaged in controlling and
13 dividing the natural flow of a stream under the authority
14 granted by this chapter, is exercising a police power of the
15 state, and water commissioners appointed by any court may
16 not deprive the department of any of the waters owned or
17 administered under agreement with respective owners. The
18 owner of a prior right contending that the department is not
19 recognizing and respecting the appropriation may resort to a
20 court for the purpose of determining whether or not the
21 rights of the claimant have been invaded, and the department
22 shall observe the terms of the final decree.

23 (6) When the department impounds or acquires the right
24 of appropriation of the waters of a stream it may divert or
25 authorize the diversion at any point on the stream or any

1 portion thereof when it is done without injury to a prior
2 appropriator."

3 Section 3. Section 85-2-301, MCA, is amended to read:
4 "85-2-301. Right to appropriate. (1) After July 1,
5 1973, a person may not appropriate water except as provided
6 in this chapter. A person may only appropriate water for a
7 beneficial use.

8 (2) (a) Only the department may appropriate water by
9 permit under 85-2-311 in either of the following instances:

10 (i) for transport outside the following river basins:

11 (A) the Clark Fork River and its tributaries to its
12 confluence with Lake Pend Oreille in Idaho;

13 (B) the Kootenai River and its tributaries to its
14 confluence with Kootenay Lake in British Columbia;

15 (C) the St. Mary River and its tributaries to its
16 confluence with the Oldman River in Alberta;

17 (D) the Little Missouri River and its tributaries to
18 its confluence with Lake Sakakawea in North Dakota;

19 (E) the Missouri River and its tributaries to its
20 confluence with the Yellowstone River in North Dakota; and

21 (F) the Yellowstone River AND ITS TRIBUTARIES to its
22 confluence with the Missouri River in North Dakota; or

23 (ii) whenever water in excess of 4,000 acre-feet a year
24 and 5.5 cubic feet per second, for any use, is to be
25 consumed.

1 (b) Water for these purposes or in these amounts may
 2 be leased from the department by any person under the
 3 provisions of [section 14 12 13].

4 (3) A right to appropriate water may not be acquired
 5 by any other method, including by adverse use, adverse
 6 possession, prescription, or estoppel. The method prescribed
 7 by this chapter is exclusive."

8 Section 4. Section 85-2-311, MCA, is amended to read:
 9 "85-2-311. Criteria for issuance of permit. (1) Except
 10 as provided in subsections (2) and--(3) through (4), the
 11 department shall issue a permit if the applicant proves by
 12 substantial credible evidence that the following criteria
 13 are met:

14 (a) there are unappropriated waters in the source of
 15 supply:

16 (i) at times when the water can be put to the use
 17 proposed by the applicant;

18 (ii) in the amount the applicant seeks to appropriate;
 19 and

20 (iii) throughout the period during which the applicant
 21 seeks to appropriate, the amount requested is available;

22 (b) the water rights of a prior appropriator will not
 23 be adversely affected;

24 (c) the proposed means of diversion, construction, and
 25 operation of the appropriation works are adequate;

1 (d) the proposed use of water is a beneficial use;

2 (e) the proposed use will not interfere unreasonably
 3 with other planned uses or developments for which a permit
 4 has been issued or for which water has been reserved.

5 (2) ~~(a)~~ The department may not issue a permit for an
 6 appropriation of ~~10,000~~ 4,000 or more acre-feet of water a
 7 year ~~or 15~~ and 5.5 or more cubic feet per second of water
 8 unless ~~it affirmatively finds~~ the applicant proves by clear
 9 and convincing evidence that:

10 ~~(i)~~ (a) the criteria in subsection (1) are met;

11 ~~(ii)~~ (b) the--applicant--has--proven---by---clear---and
 12 convincing--evidence--that the rights of a prior appropriator
 13 will not be adversely affected;

14 ~~(iii)~~ (c) the proposed appropriation is a reasonable
 15 use. Such a finding shall be based on a consideration of the
 16 following:

17 ~~(A)~~ (i) the existing demands on the state water supply,
 18 as well as projected demands such as reservations of water
 19 for future beneficial purposes, including municipal water
 20 supplies, irrigation systems, and minimum streamflows for
 21 the protection of existing water rights and aquatic life;

22 ~~(B)~~ (ii) the benefits to the applicant and the state;

23 ~~(C)~~ (iii) the economic feasibility of the project;

24 ~~(D)~~ (iv) the effects on the quantity, and quality,--and
 25 potability of water for existing beneficial uses in the

1 source of supply;

2 (iv) the availability and feasibility of using
3 low-quality water for the purpose for which application has
4 been made;

5 (v) the effects on private property rights by any
6 creation of or contribution to saline seep; and

7 (vi) the probable significant adverse environmental
8 impacts of the proposed use of water as determined by the
9 department pursuant to Title 75, chapter 1, or Title 75,
10 chapter 20.

11 (b) --A permit for an appropriation for a diversion for
12 a consumptive use of 10,000 or more acre-feet of water a
13 year or 15 or more cubic feet per second of water under this
14 subsection may not be issued unless the department petitions
15 the legislature and the legislature affirms the findings of
16 the department.

17 (3) (a) The state of Montana has long recognized the
18 importance of conserving its public waters and the necessity
19 to maintain adequate water supplies for the state's water
20 requirements, INCLUDING REQUIREMENTS FOR RESERVED WATER
21 RIGHTS HELD BY THE UNITED STATES FOR FEDERAL RESERVED LANDS
22 AND IN TRUST FOR THE VARIOUS INDIAN TRIBES WITHIN THE
23 STATE'S BOUNDARIES. Although the state of Montana also
24 recognizes that, under appropriate conditions, the
25 out-of-state transportation and use of its public waters are

1 not in conflict with the public welfare of its citizens or
2 the conservation of its waters, the criteria in this
3 subsection (3) must be met before out-of-state use may
4 occur.

5 (b) The department may not issue a permit for the
6 appropriation of water for withdrawal and transportation for
7 use outside the state unless the applicant proves by clear
8 and convincing evidence that:

9 (i) depending on the volume of water diverted or
10 consumed, the applicable criteria and procedures of
11 subsection (1) or (2) are met;

12 (ii) the proposed out-of-state use of water is not
13 contrary to water conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not
15 otherwise detrimental to the public welfare of the citizens
16 of Montana.

17 (c) In determining whether the applicant has proved by
18 clear and convincing evidence that the requirements of
19 subsections (3)(b)(ii) and (3)(b)(iii) are met, the
20 department shall consider the following factors:

21 (i) whether there are present or projected water
22 shortages within the state of Montana;

23 (ii) whether the water that is the subject of the
24 application could feasibly be transported to alleviate water
25 shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

~~(3)~~(4) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is ~~null-and-void~~ invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, use, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 5. Section 85-2-312, MCA, is amended to read:

"85-2-312. Terms of permit. (1) The department may issue a permit for less than the amount of water requested,

but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. ~~It Based upon the criteria listed in 85-2-311, the~~ THE department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary ~~to protect the rights of other appropriators~~ TO SATISFY THE CRITERIA LISTED IN 85-2-311, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.

(2) The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.

(3) The original of the permit shall be sent to the permittee, and a copy shall be kept in the office of the

department in Helena.

(4) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all water right permits, certificates, and change approvals issued by the department within the county."

Section 6. Section 85-2-124, MCA, is amended to read:

"85-2-124. Fees for environmental impact statements.

(1) Whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act and the application (or combination of applications) involves the use of ~~10,000~~ 4,000 or more acre-feet per year ~~or 15~~ and 5.5 or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within 90 days of receipt of a correct and complete application (or a combination of applications) if it determines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1), the applicant shall pay a fee based upon the estimated cost of constructing, repairing, or changing the

appropriation and diversion facilities as herein provided.

The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale:
2% of the estimated cost up to \$1 million; plus 1% of the estimated cost over \$1 million and up to \$20 million; plus 1/2 of 1% of the estimated cost over \$20 million and up to \$100 million; plus 1/4 of 1% of the estimated cost over \$100 million and up to \$300 million; plus 1/8 of 1% of the estimated cost over \$300 million. The fee shall be deposited in the state special revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the application(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control

of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant at the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a certificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This section shall apply to all applications, pending or hereinafter filed, for which the department has not, as of April 9, 1975, commenced writing an environmental impact statement. This section shall not apply to any application, the fee for which would not exceed \$2,500.

(7) Failure to submit the fee as required by this

section shall void the application(s).

(8) The department may in its discretion rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its environmental impact statement."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights. ~~{1}--An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.~~

~~{2}--The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons,--if the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308{2},--and hearings shall be held in accordance with 85-2-309.~~

~~{3}--An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation~~

1 right--from--an--agricultural--or--irrigation--use---to---an
2 industrial--use-

3 {4}--The--department--may--approve--a--change--subject--to
4 such--terms,--conditions,--restrictions,--and--limitations--it
5 considers---necessary---to---protect--the--rights--of--other
6 appropriators,--including--limitations--on--the---time---for
7 completion--of--the--change-

8 {5}--If--a--change--is--not--completed--as--approved--by--the
9 department--or--if--the--terms,--conditions,--restrictions,--and
10 limitations--of--the--change--approval--are--not--complied--with,
11 the--department--may,--after--notice--and--opportunity---for
12 hearing,--require--the--appropriator--to--show--cause--why--the
13 change--approval--should--not--be--modified--or--revoked,--if--the
14 appropriator--fails--to--show--sufficient--cause,--the--department
15 may--modify--or--revoke--the--change--approval-

16 {6}--Without--obtaining---prior---approval---from---the
17 department,--an--appropriator--may--not--sever--all--or--any--part--of
18 an--appropriation--right--from--the--land--to--which--it--is
19 appurtenant,--sell--the--appropriation--right--for--other--purposes
20 or--to--other--lands,--or--make--the---appropriation---right
21 appurtenant--to--other--lands. The--department--shall--approve--the
22 proposed--change--if--it--determines--that--the--proposed--change
23 will--not--adversely--affect--the--water--rights--of--other--persons.
24 If--the--department--determines--that--the--proposed--change--might
25 adversely--affect--the--water--rights--of--other--persons,--notice

1 of--the--proposed--change--must--be--given---in--accordance---with
2 85-2-307,---if---the--department--then--determines---that---an
3 objection--filed--by---a--person--whose--water--rights--may--be
4 affected---states---a--valid--objection--to--the--proposed--change,
5 the--department--shall--hold--a--hearing--thereon--prior--to--its
6 approval--or--denial--of--the--proposed--change. Objections--must
7 meet--the--requirements--of--85-2-308,--and--hearings--must--be--held
8 in--accordance--with--85-2-309: (1) An appropriator may not
9 make a change in an appropriation right except as permitted
10 under this section and with the approval of the department
11 or, if applicable, of the legislature.

12 (2) Except as provided in subsections (3) through (5),
13 the department shall approve a change in appropriation right
14 if the appropriator proves by substantial credible evidence
15 that the following criteria are met:

16 (a) The proposed use will not adversely affect the
17 water rights of other persons or other planned uses or
18 developments for which a permit has been issued or for which
19 water has been reserved.

20 (b) The proposed means of diversion, construction, and
21 operation of the appropriation works are adequate.

22 (c) The proposed use of water is a beneficial use.

23 (3) The department may not approve a change in purpose
24 of use or place of use of an appropriation of 4,000 or more
25 acre-feet of water a year and 5.5 or more cubic feet per

1 second of water unless the appropriator proves by clear--and
 2 convincing SUBSTANTIAL CREDIBLE evidence that:

3 (a) the criteria in subsection (2) are met;

4 (b) the proposed change is a reasonable use. A
 5 finding of reasonable use must be based on a consideration
 6 of:

7 (i) the existing demands on the state water supply, as
 8 well as projected demands of water for future beneficial
 9 purposes, including municipal water supplies, irrigation
 10 systems, and minimum streamflows for the protection of
 11 existing water rights and aquatic life;

12 (ii) the benefits to the applicant and the state;

13 (iii) the effects on the quantity and quality of water
 14 for existing uses in the source of supply;

15 (iv) the availability and feasibility of using
 16 low-quality water for the purpose for which application has
 17 been made;

18 (v) the effects on private property rights by any
 19 creation of or contribution to saline seep; and

20 (vi) the probable significant adverse environmental
 21 impacts of the proposed use of water as determined by the
 22 department pursuant to Title 75, chapter 1, or Title 75,
 23 chapter 20.

24 (4) The department may not approve a change in purpose
 25 of use or place of use for a diversion that results in 4,000

1 or more acre-feet of water a year and 5.5 or more cubic feet
 2 per second of water being consumed unless:

3 (a) the applicant proves by clear and convincing
 4 evidence and the department finds that the criteria in
 5 subsections (2) and (3) are met; and

6 (b) the department then petitions the legislature and
 7 the legislature affirms the decision of the department after
 8 a-public-hearing ONE OR MORE PUBLIC HEARINGS.

9 (5) (a) The state of Montana has long recognized the
 10 importance of conserving its public waters and the necessity
 11 to maintain adequate water supplies for the state's water
 12 requirements, INCLUDING REQUIREMENTS FOR RESERVED WATER
 13 RIGHTS HELD BY THE UNITED STATES FOR FEDERAL RESERVED LANDS
 14 AND IN TRUST FOR THE VARIOUS INDIAN TRIBES WITHIN THE
 15 STATE'S BOUNDARIES. Although the state of Montana also
 16 recognizes that, under appropriate conditions, the
 17 out-of-state transportation and use of its public waters are
 18 not in conflict with the public welfare of its citizens or
 19 the conservation of its waters, the following criteria must
 20 be met before out-of-state use may occur:

21 (b) The department and, if applicable, the legislature
 22 may not approve a change in appropriation right for the
 23 withdrawal and transportation of appropriated water for use
 24 outside the state unless the appropriator proves by clear
 25 and convincing evidence and, if applicable, the legislature

approves after ~~a-public-hearing~~ ONE OR MORE PUBLIC HEARINGS
that:

(i) depending on the volume of water diverted or
consumed, the applicable criteria and procedures of
subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not
contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not
otherwise detrimental to the public welfare of the citizens
of Montana.

(c) In determining whether the appropriator has proved
by clear and convincing evidence that the requirements of
subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
department and, if applicable, the legislature shall
consider the following factors:

(i) whether there are present or projected water
shortages within the state of Montana;

(ii) whether the water that is the subject of the
proposed change in appropriation might feasibly be
transported to alleviate water shortages within the state of
Montana;

(iii) the supply and sources of water available to the
applicant in the state where the applicant intends to use
the water; and

(iv) the demands placed on the applicant's supply in

the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right
to withdraw and transport water for use outside the state,
the applicant shall submit to and comply with the laws of
the state of Montana governing the appropriation and use of
water.

(6) For any application for a change in appropriation
right involving 4,000 or more acre-feet of water a year and
5.5 or more cubic feet per second of water, the department
shall give notice of the proposed change in accordance with
85-2-307 and shall hold ~~a-hearing~~ ONE OR MORE HEARINGS in
accordance with 85-2-309 prior to its approval or denial of
the proposed change. The department shall provide notice
and may hold ~~a-hearing~~ ONE OR MORE HEARINGS upon any other
proposed change if it determines that such a change might
adversely affect the rights of other persons.

(7) The department or the legislature, if applicable,
may approve a change subject to such terms, conditions,
restrictions, and limitations as it considers necessary to
~~protect-the-rights-of-other-persons-and~~ satisfy the criteria
of this section, including limitations on the time for
completion of the change.

(8) If a change is not completed as approved by the
department or legislature or if the terms, conditions,
restrictions, and limitations of the change approval are not

complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

+7+(9) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

+8+(10) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(11) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 8. Section 75-20-104, MCA, is amended to read:

"75-20-104. Definitions. In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Addition thereto" means the installation of new machinery and equipment which would significantly change the conditions under which the facility is operated.

(2) "Application" means an application for a certificate submitted in accordance with this chapter and the rules adopted hereunder.

(3) "Associated facilities" includes but is not limited to transportation links of any kind, aqueducts, diversion dams, PIPELINES, transmission substations, storage ponds, reservoirs, and any other device or equipment associated with the production or delivery of the energy form or product produced by a facility, except that the term does not include a facility OR A NATURAL GAS OR CRUDE OIL GATHERING LINE 17 INCHES OR LESS IN INSIDE DIAMETER.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site

1 or route of a facility but does not mean changes needed for
2 temporary use of sites or routes for nonutility purposes or
3 uses in securing geological data, including necessary
4 borings to ascertain foundation conditions;

5 (b) the fracturing of underground formations by any
6 means if such activity is related to the possible future
7 development of a gasification facility or a facility
8 employing geothermal resources but does not include the
9 gathering of geological data by boring of test holes or
10 other underground exploration, investigation, or
11 experimentation;

12 (c) the commencement of eminent domain proceedings
13 under Title 70, chapter 30, for land or rights-of-way upon
14 or over which a facility may be constructed;

15 (d) the relocation or upgrading of an existing
16 facility defined by (b) or (c) of subsection (10), including
17 upgrading to a design capacity covered by subsection
18 (10)(b), except that the term does not include normal
19 maintenance or repair of an existing facility.

20 (8) "Department" means the department of natural
21 resources and conservation provided for in Title 2, chapter
22 15, part 33.

23 (9) "Department of health" means the department of
24 health and environmental sciences provided for in Title 2,
25 chapter 15, part 21.

1 (10) "Facility" means:

2 (a) except for crude oil and natural gas refineries,
3 ~~and facilities and associated facilities designed for or~~
4 ~~capable of producing, gathering, processing, transmitting,~~
5 ~~transporting, or distributing crude oil or natural gas,~~ and
6 those facilities subject to The Montana Strip and
7 Underground Mine Reclamation Act, each plant, unit, or other
8 facility and associated facilities designed for or capable
9 of:

10 (i) generating 50 megawatts of electricity or more or
11 any addition thereto (except pollution control facilities
12 approved by the department of health and environmental
13 sciences added to an existing plant) having an estimated
14 cost in excess of \$10 million;

15 (ii) producing 25 million cubic feet or more of gas
16 derived from coal per day or any addition thereto having an
17 estimated cost in excess of \$10 million;

18 (iii) producing 25,000 barrels of liquid hydrocarbon
19 products per day or more or any addition thereto having an
20 estimated cost in excess of \$10 million;

21 (iv) enriching uranium minerals or any addition thereto
22 having an estimated cost in excess of \$10 million; or

23 (v) utilizing or converting 500,000 tons of coal per
24 year or more or any addition thereto having an estimated
25 cost in excess of \$10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length;

~~(c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section;~~

(d)(C) each pipeline, WHETHER PARTIALLY OR WHOLLY WITHIN THE STATE, greater than 17 inches in INSIDE diameter and 30 miles in length, and associated facilities;

~~(d)(e)(D)~~ any use of geothermal resources, including the use of underground space in existence or to be created, for the creation, use, or conversion of energy; designed for or capable of producing geothermally derived power equivalent to 25 million Btu per hour or more or any addition thereto having an estimated cost in excess of \$750,000;

~~(e)(f)(E)~~ any underground in situ gasification of coal.

(11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association,

government subdivision, government agency, local government, or other organization or entity.

(12) "Transmission substation" means any structure, device, or equipment assemblage, commonly located and designed for voltage regulation, circuit protection, or switching necessary for the construction or operation of a proposed transmission line.

(13) "Utility" means any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use."

~~Section 9. Section 75-20-216, MCA, is amended to read:~~

~~"75-20-216. Study, evaluation, and report on proposed facility---assistance by other agencies. (1) After receipt of an application, the department and department of health shall within 90 days notify the applicant in writing that: (a) the application is in compliance and is accepted as complete; or~~

~~(b) the application is not in compliance and list the deficiencies therein; and upon correction of these deficiencies and resubmission by the applicant, the department and department of health shall within 30 days notify the applicant in writing that the application is in compliance and is accepted as complete.~~

~~(2) Upon receipt of an application complying with~~

1 75-20-211 through 75-20-215, and this section, the
 2 department shall commence an intensive study and evaluation
 3 of the proposed facility and its effects, considering all
 4 applicable criteria listed in 75-20-301 and 75-20-503 and
 5 the department of health shall commence a study to enable it
 6 or the board of health to issue a decision, opinion, order,
 7 certification, or permit as provided in subsection (3). The
 8 department and department of health shall use, to the extent
 9 they consider applicable, valid and useful existing studies
 10 and reports submitted by the applicant or compiled by a
 11 state or federal agency.

12 (3) The department of health shall within 1 year
 13 following the date of acceptance of an application and the
 14 board of health or department of health, if applicable,
 15 within an additional 6 months issue any decision, opinion,
 16 order, certification, or permit required under the laws
 17 administered by the department of health or the board of
 18 health and this chapter. The department of health and the
 19 board of health shall determine compliance with all
 20 standards, permit requirements, and implementation plans
 21 under their jurisdiction for the primary and reasonable
 22 alternate locations in their decision, opinion, order,
 23 certification, or permit. The decision, opinion, order,
 24 certification, or permit, with or without conditions, is
 25 conclusive on all matters that the department of health and

1 board of health administer, and any of the criteria
 2 specified in subsections (2) through (7) of 75-20-503 that
 3 are a part of the determinations made under the laws
 4 administered by the department of health and the board of
 5 health. Although the decision, opinion, order,
 6 certification, or permit issued under this subsection is
 7 conclusive, the board retains authority to make the
 8 determination required under 75-20-301(2)(c). The decision,
 9 opinion, order, certification, or permit of the department
 10 of health or the board of health satisfies the review
 11 requirements by those agencies and shall be acceptable in
 12 lieu of an environmental impact statement under the Montana
 13 Environmental Policy Act. A copy of the decision, opinion,
 14 order, certification, or permit shall be served upon the
 15 department and the board and shall be utilized as part of
 16 their final site selection process. Prior to the issuance of
 17 a preliminary decision by the department of health and
 18 pursuant to rules adopted by the board of health, the
 19 department of health shall provide an opportunity for public
 20 review and comment.

21 (4) Within 22 months following acceptance of an
 22 application for a facility as defined in (a) and (d) (e) of
 23 75-20-104(10) and for a facility as defined in (b) and (c)
 24 through (d) of 75-20-104(10) which is more than 30 miles in
 25 length and within 1 year for a facility as defined in (b)

and--(c) through--(d) of 75-20-104(10) which is 30 miles or less in length, the department shall make a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any, if the application is for a combination of two or more facilities, the department shall make its report to the board within the greater of the lengths of time provided for in this subsection for either of the facilities.

(5) The departments of highways, commerce, fish, wildlife, and parks, state lands, revenue, and public service regulation shall report to the department information relating to the impact of the proposed site on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or modifying the certificate. The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report."

SECTION 9. SECTION 75-20-202, MCA, IS AMENDED TO READ:

"75-20-202. Exemptions. (1) A certificate is not required under this chapter for a facility under diligent onsite physical construction or in operation on January 1,

1973.

(2) The board may adopt reasonable rules establishing exemptions from this chapter for the relocation, reconstruction, or upgrading of a facility that:

(a) would otherwise be covered by this chapter; and

(b) (i) is unlikely to have a significant environmental impact by reason of length, size, location, available space or right-of-way, or construction methods; or
(ii) utilizes coal, wood, biomass, grain, wind, or sun as a fuel source and the technology of which will result in greater efficiency, promote energy conservation, and promote greater system reliability than the existing facility.

(3) This chapter does not apply to a facility defined in 75-20-104(10)(c) that has been designated by the governor for environmental review by an executive agency of the state for the purpose of complying with Title 75, chapter 1, pursuant to Executive Order 4-81 and prior to [the effective date of this act]."

Section 10. Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date -- location -- department to act as staff -- hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. Except--for--those

1 ~~hearings--involving-applications-submitted-for-facilities-as~~
 2 ~~defined-in--(b)--and--(c)--of--75-20-104(10)--certification~~
 3 Certification hearings shall be conducted by the board in
 4 the county seat of Lewis and Clark County or the county in
 5 which the facility or the greater portion thereof is to be
 6 located.

7 (2) Except as provided in 75-20-221(2), the department
 8 shall act as the staff for the board throughout the
 9 decisionmaking process and the board may request the
 10 department to present testimony or cross-examine witnesses
 11 as the board considers necessary and appropriate.

12 (3) At the request of the applicant, the department of
 13 health and the board of health shall hold any required
 14 permit hearings required under laws administered by those
 15 agencies in conjunction with the board certification
 16 hearing. In such a conjunctive hearing the time periods
 17 established for reviewing an application and for issuing a
 18 decision on certification of a proposed facility under this
 19 chapter supersede the time periods specified in other laws
 20 administered by the department of health and the board of
 21 health."

22 Section 11. Section 75-20-303, MCA, is amended to
 23 read:

24 "75-20-303. Opinion issued with decision -- contents.
 25 (1) In rendering a decision on an application for a

1 certificate, the board shall issue an opinion stating its
 2 reasons for the action taken.

3 (2) If the board has found that any regional or local
 4 law or regulation which would be otherwise applicable is
 5 unreasonably restrictive pursuant to 75-20-301(2)(f), it
 6 shall state in its opinion the reasons therefor.

7 (3) Any certificate issued by the board shall include
 8 the following:

9 (a) an environmental evaluation statement related to
 10 the facility being certified. The statement shall include
 11 but not be limited to analysis of the following information:

12 (i) the environmental impact of the proposed facility;

13 (ii) any adverse environmental effects which cannot be
 14 avoided by issuance of the certificate;

15 (iii) problems and objections raised by other federal
 16 and state agencies and interested groups;

17 (iv) alternatives to the proposed facility;

18 (v) a plan for monitoring environmental effects of the
 19 proposed facility; and

20 (vi) a time limit as provided in subsection (4), during
 21 which construction of the facility must be completed;

22 (b) a statement signed by the applicant showing
 23 agreement to comply with the requirements of this chapter
 24 and the conditions of the certificate.

25 (4) The board shall issue as part of the certificate

1 the following time limits during which construction of a
2 facility must be completed:

3 (a) For a facility as defined in (b) 7 or OR (c) 7 or
4 fd of 75-20-104(10) that is more than 30 miles in length,
5 the time limit is 10 years.

6 (b) For a facility as defined in (b) 7 or (c) 7 or (d)
7 of 75-20-104(10) that is 30 miles or less in length, the
8 time limit is 5 years.

9 (c) The time limit shall be extended for periods of 2
10 years each upon a showing by the applicant to the board that
11 a good faith effort is being undertaken to complete
12 construction. Under this subsection, a good faith effort to
13 complete construction includes the process of acquiring any
14 necessary state or federal permit or certificate for the
15 facility and the process of judicial review of any such
16 permit or certificate.

17 (5) The provisions of subsection (4) apply to any
18 facility for which a certificate has not been issued or for
19 which construction is yet to be commenced."

20 Section 12, Section 75-20-304, MEA, is amended to
21 read:

22 "75-20-304. Waiver of provisions of certification
23 proceedings: (1) The board may waive compliance with any of
24 the provisions of 75-20-216 through 75-20-222, 75-20-501,
25 and this part if the applicant makes a clear and convincing

1 showing to the board at a public hearing that an immediate
2 urgent need for a facility exists and that the applicant did
3 not have knowledge that the need for the facility existed
4 sufficiently in advance to fully comply with the provisions
5 of 75-20-216 through 75-20-222, 75-20-501, and this part:

6 (2) The board may waive compliance with any of the
7 provisions of this chapter upon receipt of notice by a
8 utility or person subject to this chapter that a facility or
9 associated facility has been damaged or destroyed as a
10 result of fire, flood, or other natural disaster or as the
11 result of insurrection, war, or other civil disorder and
12 there exists an immediate need for construction of a new
13 facility or associated facility or the relocation of a
14 previously existing facility or associated facility in order
15 to promote the public welfare:

16 (3) The board shall waive compliance with the
17 requirements of subsections (2)(c), (3)(b), and (3)(c) of
18 75-20-301 and 75-20-501(5) and the requirements of
19 subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3),
20 and 75-20-303(3)(a)(iv) relating to consideration of
21 alternative sites if the applicant makes a clear and
22 convincing showing to the board at a public hearing that:

23 (a) a proposed facility will be constructed in a
24 county where a single employer within the county has
25 permanently curtailed or ceased operations causing a loss of

1 250--or-more-permanent-jobs-within-2-years-at-the-employer's
 2 operations-within-the-preceding-10-year-period;
 3 (b)--the-county-and-municipal-governing-bodies-in-whose
 4 jurisdiction-the-facility-is-proposed-to-be-located--support
 5 by-resolution-such-a-waiver;
 6 (c)--the-proposed-facility-will-be-constructed-within-a
 7 15-mile--radius--of--the-operations-that-have-ceased-or-been
 8 curtailed;-and
 9 (d)--the--proposed--facility--will--have--a--beneficial
 10 effect-on-the-economy-of-the-county-in-which-the-facility-is
 11 proposed-to-be-located;
 12 (4)--The--waiver-provided-for-in-subsection-(3)--applies
 13 only-to-permanent-job--losses--by--a--single--employer--The
 14 waiver-provided-for-in-subsection-(3)--does-not-apply-to-jobs
 15 of-a-temporary-or-seasonal-nature,-including-but-not-limited
 16 to--construction--jobs,-or-job-losses-during-labor-disputes;
 17 (5)--The-waiver-provided-for-in-subsection-(3)--does-not
 18 apply-to-consideration-of-alternatives-or--minimum--adverse
 19 environmental--impact--for-a-facility-defined-in-subsections
 20 (10)(b)-,-(c)-,-(d)-, (e) or (f) of--75-20-104,-for--an
 21 associated--facility-defined-in-subsection-(3)-of-75-20-104,
 22 or-for-any-portion-of-or-process-in-a-facility--defined--in
 23 subsection--(10)(a)--of--75-20-104--to--the--extent-that-the
 24 process-or-portion-of-the--facility--is--not--subject--to--a
 25 permit--issued--by--the--department--of--health--or-board-of

1 health;
 2 (6)--The-applicant-shall-pay-all-expenses--required--to
 3 process--and--conduct--a--hearing--on-a-waiver-request-under
 4 subsection--(3);--However,-any--payments--made--under--this
 5 subsection--shall--be--credited--toward--the--fee-paid-under
 6 75-20-215-to-the-extent-the-data-or--evidence--presented--at
 7 the--hearing--or--the-decision-of-the-board-under-subsection
 8 (3)--can-be-used-in-making--a--certification--decision--under
 9 this-chapter;
 10 (7)--The--board--may--grant--only--one--waiver--under
 11 subsections-(3)-and-(4)-for-each-permanent-loss-of--jobs-as
 12 defined-in-subsection-(3)(a);"
 13 Section 12. Section 75-20-1202, MCA, is amended to
 14 read:
 15 "75-20-1202. Definitions. As used in this part and
 16 75-20-201 through 75-20-203, the following definitions
 17 apply:
 18 (1) (a) "Nuclear facility" means each plant, unit, or
 19 other facility designed for or capable of:
 20 (i) generating 50 megawatts of electricity or more by
 21 means of nuclear fission;
 22 (ii) converting, enriching, fabricating, or
 23 reprocessing uranium minerals or nuclear fuels; or
 24 (iii) storing or disposing of radioactive wastes or
 25 materials from a nuclear facility.

(b) "Nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility", as defined in 75-20-104~~(7)~~(10), is further defined to include any nuclear facility as defined in subsection (1)(a) of this section."

NEW SECTION. Section 13. Water leasing program. (1) There is a water leasing program administered by the department on behalf of the state of Montana. WATER LEASES ISSUED UNDER THIS PROGRAM MUST BE APPROVED BY THE BOARD.

(2) The department may acquire rights to water needed for leasing under this program through appropriation of water in its own name or by agreement with or purchase from another holder of water rights.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck Reservoir, if an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state is in effect;

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail Reservoirs if and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenues with the state from one or more of these reservoirs; and

(d) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered; and

(ii) for which and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenues with the state.

(4) Water may be leased for any beneficial use. The amount of water that can be leased under this program for all beneficial uses shall not exceed 50,000 acre-feet.

(5) The term of any lease may not exceed 50 years. A term may be extended up to another 50 years if the department again determines the desirability of leasing by applying the considerations set forth in subsection (7). In making such a redetermination, the department may require the completion of an environmental impact statement in accordance with subsection (6).

(6) The department shall require the completion of an environmental impact statement under the provisions of Title

75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more of water and for any other application for which an environmental impact statement is required by law. The department shall require the completion of an environmental impact statement whenever the cumulative effect of more than one application for a lease would constitute a probable significant environmental impact.

(7) Upon application by any person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant. Such a determination of desirability shall be made solely on the following considerations:

(a) the content of the environmental impact statement, if required;

(b) whether there is sufficient water available under the water leasing program; and

(c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

(8) The department shall for any agreement require commercially reasonable terms and conditions, which may include the requirement that up to 25% of the water to be leased be made available to a potential user for any beneficial use upon payment by such user of the costs of

tapping into and removing water from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial use of the water.

(9) The lease of water or the use of water under a lease does not constitute a permit as provided in 85-2-102 and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

(10) For purposes of the water leasing program established in this section, it is the intent of the legislature that the state act as a proprietor.

Section 14. Section 85-1-205, MCA, is amended to read:

"85-1-205. Acquisition of water in federal reservoirs.

~~(1)~~ The department may acquire water or water storage by purchase option or agreement with the federal government from any federal reservoir for the purpose of sale, rent, or distribution for ~~industrial-and-other--uses~~ any beneficial use. In such cases, the department is not required to construct any diversion or appropriation facilities or works, and it may sell, rent, or distribute such water at such rates and under such terms and conditions as it considers appropriate, ~~except as provided in subsection (2)~~.

~~(2) Until a final decree has been issued pursuant to 85-2-234 concerning the waters in a federal reservoir, the department may sell, rent, or distribute such water only after a permit has been issued to an applicant for purchase,~~

~~renty-or-distribution-of-water-in-accordance-with-part-3--of
this-chapter--"~~

Section 15. Section 85-2-316, MCA, is amended to read:

"85-2-316. Reservation of waters. (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Water may be reserved only for existing or future beneficial uses in the following river basins:

(a) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(b) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(c) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(d) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(e) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(f) the Yellowstone River AND ITS TRIBUTARIES to its confluence with the Missouri River in North Dakota.

~~†2†(3)~~ Upon receiving an application, the department

shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

~~†3†(4)~~ (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

~~†a†(i)~~ the purpose of the reservation;

~~†b†(ii)~~ the need for the reservation;

~~†c†(iii)~~ the amount of water necessary for the purpose of the reservation;

~~†d†(iv)~~ that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

1 (i) the proposed out-of-state use of water is not
 2 contrary to water conservation in Montana; and

3 (ii) the proposed out-of-state use of water is not
 4 otherwise detrimental to the public welfare of the citizens
 5 of Montana.

6 (c) In determining whether the applicant has proved by
 7 clear and convincing evidence that the requirements of
 8 subsections (4)(b)(i) and (4)(b)(ii) are met, the board
 9 shall consider the following factors:

10 (i) whether there are present or projected water
 11 shortages within the state of Montana;

12 (ii) whether the water that is the subject of the
 13 application could feasibly be transported to alleviate water
 14 shortages within the state of Montana;

15 (iii) the supply and sources of water available to the
 16 applicant in the state where the applicant intends to use
 17 the water; and

18 (iv) the demands placed on the applicant's supply in
 19 the state where the applicant intends to use the water.

20 (d) When applying for a reservation to withdraw and
 21 transport water for use outside the state, the applicant
 22 shall submit to and comply with the laws of the state of
 23 Montana governing the appropriation, lease, use, and
 24 reservation of water.

25 †4†(5) If the purpose of the reservation requires

1 construction of a storage or diversion facility, the
 2 applicant shall establish to the satisfaction of the board
 3 that there will be progress toward completion of the
 4 facility and accomplishment of the purpose with reasonable
 5 diligence in accordance with an established plan.

6 †5†(6) The board shall limit any reservations after
 7 May 9, 1979, for maintenance of minimum flow, level, or
 8 quality of water that it awards at any point on a stream or
 9 river to a maximum of 50% of the average annual flow of
 10 record on gauged streams. Ungauged streams can be allocated
 11 at the discretion of the board.

12 †6†(7) After the adoption of an order reserving
 13 waters, the department may reject an application and refuse
 14 a permit for the appropriation of reserved waters or may,
 15 with the approval of the board, issue the permit subject to
 16 such terms and conditions it considers necessary for the
 17 protection of the objectives of the reservation.

18 †7†(8) Any person desiring to use water reserved to a
 19 conservation district for agricultural purposes shall make
 20 application for such use with the district, and the district
 21 upon approval of the application must inform the department
 22 of the approved use. The department shall maintain records
 23 of all uses of water reserved to conservation districts and
 24 be responsible, when requested by the districts, for
 25 rendering technical and administrative assistance within the

1 department's staffing and budgeting limitations in the
 2 preparation and processing of such applications for the
 3 conservation districts. The department shall, within its
 4 staffing and budgeting limitations, complete any feasibility
 5 study requested by the districts within 12 months of the
 6 time the request was made. The board shall extend the time
 7 allowed to develop a plan identifying projects for utilizing
 8 a district's reservation so long as the conservation
 9 district makes a good faith effort, within its staffing and
 10 budget limitations, to develop a plan.

11 ~~†8†~~(9) A reservation under this section shall date
 12 from the date the order reserving the water is adopted by
 13 the board and shall not adversely affect any rights in
 14 existence at that time.

15 ~~†9†~~(10) The board shall, periodically but at least once
 16 every 10 years, review existing reservations to ensure that
 17 the objectives of the reservation are being met. Where the
 18 objectives of the reservation are not being met, the board
 19 may extend, revoke, or modify the reservation.

20 ~~†10†~~(11) The board may modify an existing or future
 21 order originally adopted to reserve water for the purpose of
 22 maintaining minimum flow, level, or quality of water, so as
 23 to reallocate such reservation or portion thereof to an
 24 applicant who is a qualified reservant under this section.
 25 Reallocation of reserved water may be made by the board

1 following notice and hearing wherein the board finds that
 2 all or part of the reservation is not required for its
 3 purpose and that the need for the reallocation has been
 4 shown by the applicant to outweigh the need shown by the
 5 original reservant. Reallocation of reserved water shall not
 6 adversely affect the priority date of the reservation, and
 7 the reservation shall retain its priority date despite
 8 reallocation to a different entity for a different use. The
 9 board may not reallocate water reserved under this section
 10 on any stream or river more frequently than once every 5
 11 years.

12 ~~†11†~~(12) Nothing in this section vests the board with
 13 the authority to alter a water right that is not a
 14 reservation.

15 (13) The department shall undertake a program to
 16 educate the public, other state agencies, and political
 17 subdivisions of the state as to the benefits of the
 18 reservation process and the procedures to be followed to
 19 secure the reservation of water. The department shall
 20 provide technical assistance to other state agencies and
 21 political subdivisions in applying for reservations under
 22 this section.

23 (14) Water reserved under this section is not subject
 24 to the state water leasing program established under
 25 [section 14 12 13]."

NEW SECTION. Section 16. Reservations within Missouri River basin. (1) The state or any agency or political subdivision thereof or the United States or any agency thereof that desires to apply for a reservation of water in the Missouri River basin shall file ~~a claim~~ AN APPLICATION pursuant to 85-2-316 no later than July 1, 1987.

(2) The SUBJECT TO LEGISLATIVE APPROPRIATION, THE department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for reservations within the Missouri River basin.

(3) Before December 31, 1989, the board shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1987, for reservations of water in the Missouri River basin.

(4) Water reservations approved by the board under this section have a priority date of July 1, 1985. The board shall by order establish the relative priority of applications approved under this section.

Section 17. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing

rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system.

~~†4†~~(5) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

1 †5†(6) upon request by any person, cooperate with,
2 assist, and advise that person in matters pertaining to
3 measuring water or filing claims of existing rights with a
4 district court under this chapter;

5 †6†(7) adopt rules necessary to reject, modify, or
6 condition permit applications in highly appropriated basins
7 or subbasins as provided in 85-2-319."

8 Section 18. Section 85-1-203, MCA, is amended to read:

9 "85-1-203. State water plan. (1) The department shall
10 gather from any source reliable information relating to
11 Montana's water resources and prepare therefrom a continuing
12 comprehensive inventory of the water resources of the state.
13 In preparing this inventory, the department may conduct
14 studies; adopt studies made by other competent water
15 resource groups, including federal, regional, state, or
16 private agencies; perform research or employ other competent
17 agencies to perform research on a contract basis; and hold
18 public hearings in affected areas at which all interested
19 parties shall be given an opportunity to appear.

20 (2) The department shall formulate and, with the
21 approval of the board, adopt and from time to time amend,
22 extend, or add to a comprehensive, coordinated multiple-use
23 water resources plan known as the "state water plan". The
24 state water plan may be formulated and adopted in sections,
25 these sections corresponding with hydrologic divisions of

1 the state. The state water plan shall set out a progressive
2 program for the conservation, development, and utilization
3 of the state's water resources and propose the most
4 effective means by which these water resources may be
5 applied for the benefit of the people, with due
6 consideration of alternative uses and combinations of uses.
7 Before adoption of the state water plan or any section
8 thereof, the department shall hold public hearings in the
9 state or in an area of the state encompassed by a section
10 thereof if adoption of a section is proposed. Notice of the
11 hearing or hearings shall be published for 2 consecutive
12 weeks in a newspaper of general county circulation in each
13 county encompassed by the proposed plan or section thereof
14 at least 30 days prior to the hearing.

15 (3) The department shall submit to the water policy
16 committee established in [section 21 19 20] and to each
17 general session of the legislature the state water plan or
18 any section thereof or amendments, additions, or revisions
19 thereto which the department has formulated and adopted.

20 (4) The department shall prepare a continuing
21 inventory of the groundwater resources of the state. The
22 groundwater inventory shall be included in the comprehensive
23 water resources inventory described in subsection (1) above
24 but shall be a separate component thereof.

25 (5) The department shall publish the comprehensive

1 inventory, the state water plan, the groundwater inventory,
2 or any part of each, and the department may assess and
3 collect a reasonable charge for these publications.

4 (6) In developing and revising the state water plan as
5 provided in this section, the department shall consult with
6 the water policy committee established in [section 21 19 20]
7 and solicit the advice of the committee in carrying out its
8 duties under this section."

9 Section 19. Section 85-1-621, MCA, is amended to read:

10 "85-1-621. Report to the legislature. The department
11 shall prepare a biennial report to the legislature
12 describing the status of the water development program. The
13 report must describe ongoing projects and activities and
14 those which have been completed during the biennium. The
15 report must identify and rank in order of priority the
16 projects for which the department desires to seek
17 congressional authorization and funding and the efforts the
18 department will undertake in attempting to secure such
19 authorization and funding. The report must also describe
20 proposed projects and activities for the coming biennium and
21 recommendations for necessary appropriations. A copy of the
22 report shall be submitted to the president of the senate and
23 the speaker of the house, to the members of the water policy
24 committee established in [section 21 19 20], and to such
25 other members of the legislature as may request a copy."

1 NEW SECTION. Section 20. Water policy committee.
2 (1) There is a permanent water policy committee of the
3 legislature. The committee consists of eight members. The
4 senate committee on committees and the speaker of the house
5 of representatives shall each appoint four members on a
6 bipartisan basis. The committee shall elect its chairman
7 and vice-chairman. The committee shall meet as often as
8 necessary, including during the interim between sessions, to
9 perform the duties specified within this section.

10 (2) On a continuing basis, the committee shall:

11 (a) advise the legislature on the adequacy of the
12 state's water policy and of important state, regional,
13 national, and international developments which affect
14 Montana's water resources;

15 (b) oversee the policies and activities of the
16 department of natural resources and conservation, other
17 state executive agencies, and other state institutions, as
18 they affect the water resources of the state; and

19 (c) communicate with the public on matters of water
20 policy as well as the water resources of the state.

21 (3) On a regular basis, the committee shall:

22 (a) analyze and comment on the state water plan
23 required by 85-1-203, when filed by the department;

24 (b) analyze and comment on the report of the status of
25 the state's water development program required by 85-1-621,

when filed by the department;

(c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university;

(d) analyze, verify, and comment on the adequacy of and information contained in the water resources data management system maintained by the department under 85-2-112; and

(e) report to the legislature, not less than once every biennium.

(4) The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to receiving assistance from the environmental quality council, in carrying out its duties under this section.

Section 21. Section 85-2-122, MCA, is amended to read:

"85-2-122. Penalties. A person who violates or refuses or neglects to comply with 85-2-301--85-2-402(1),--and 85-2-403(3) the provisions of this chapter, any order of the department, or any rule of the board is guilty of a misdemeanor."

NEW SECTION. Section 22. Extension of authority. Any existing authority of the board and the department of natural resources and conservation to make rules on the subject of the provisions of this act is extended to the

provisions of this act.

Section 23. Section 7, Chapter 706, Laws of 1983, is amended to read:

"Section 7. Termination date. ~~This--act~~ Section 4 of [this act] terminates July 1, 1985. The other sections do not terminate and are permanent law."

NEW SECTION. Section 24. Repealer. Section 85-2-104, MCA, is repealed.

NEW SECTION. Section 25. Codification instruction. Sections ~~147-177--and-21 127-157-AND-19~~ 13, 16, AND 20 are intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to sections ~~147-177--and-21 127-157-AND-19~~ 13, 16, AND 20.

NEW SECTION. Section 26. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 27. Applicability. This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced.

1 NEW SECTION. Section 28. Effective date. This act is
2 effective July 1, 1985.

-End-